85-3180

No. _____

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

Mahfouz El Shahawy, M.D.,
Petitioner

v

Larry P. Elliott, M.D.

On sworn Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Eleventh Circuit in Case No. 84-3618, 83-3154 (District Court Case No. 31-545 Civ TWC)

SWORN PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNTIED STATES

MAHFOUZ EL SHAHAWY, M.D.
1851 Arlington Street
Suite 206
Sarasota, Florida 33579
(813) 366-9800
Petitioner Pro Se

QUESTIONS PRESENTED

I

WHETHER THE LOWER COURTS OVERLOOKED, OR MISAPPREHENDED THE FACT THAT THE DEFENDANT DR. ELLIOTT DID NOT PAY ANY OF THE BILL OF COSTS, BUT RATHER A THIRD PARTY, "SARASOTA MEMORIAL HOSPITAL BOARD", WHICH IS CURRENTLY INVOLVED IN RELATED LITIGATIONS IN THIS COURT.

II

WHETHER THE LOWER COURTS OVERLOOKED OR MISAPPREHENDED THE FACT THAT DEFENDANT'S ATTORNEY MR. STRELEC COMMITTED PERJURY BY SIGNING AN INCORRECT BILL OF COSTS. FURTHERMORE, HE PRESENTED THE COURT WITH PERJURED TESTIMONIES BY NUMEROUS WITNESSES. IS THIS NOT FRAUD ON THE COURT AND THE PLAINTIFF?

III

WHETHER THE LOWER COURTS OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE BILL OF COSTS SUBMITTED WAS NOT SOLEY INCURRED IN THIS CASE, AND THE APPEAL COURT OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE DISTRICT COURT ERRED IN DENYING PLAINTIFF'S MOTION TO STAY RULING UNTIL RELATED LITIGATIONS HAVE BEEN RESOLVED.

IV

WHETHER THE LOWER COURTS ERRED IN FINDING DR. ELLIOTT'S REMARKS QUALIFIEDLY PRIVILEGED, THAT ELLIOTT'S REMARKS WERE NOT UTTERED MALICIOUSLY, EXCLUDING EVIDENCE FOR DAMAGE OF SHAHAWY'S REPUTATION.

V

WHETHER THE LOWER COURTS OVERLOOKED, OR MISAPPREHENDED THE FACT OF THE NEWLY DISCOVERED EVIDENCE TO SUPPORT THE LINK OF A CONSPIRACY BETWEEN DEFENDANT DR. LARRY ELLIOTT AND SARASOTA COUNTY PUBLIC HOSPITAL BOARD, WHICH WAS DIRECTLY

OR INDIRECTLY RESPONSIBLE FOR DENIAL OF PLAINTIFF'S PRIVILEGES AT SARASOTA COUNTY PUBLIC HOSPITAL BOARD, WHICH IS IN VIOLATION OF FEDERAL ANTI-TRUST LAWS, CIVIL RIGHTS ACT, THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATION ACT, AND FLORIDA STATUTES AND COMMON LAW.

VI

WHETHER THE LOWER COURTS OVERLOOKED IMPORTANT FACTS AND FAILED TO REMAND FOR A NEW TRIAL BEFORE A JURY BASED ON NEW DISCOVERIES AND FRAUD OF SARASOTA COUNTY PUBLIC HOSPITAL FUNDS BY DEFENDANT LARRY ELLIOTT.

TABLE OF CITATIONS

CASES	PAGE
City of Boca Raton v Boca Villiage Corp. (Fla. App) 372 So2d 485	18-19
Copper Liquor Inc. v Adolph Coors 684 F2d 1087, 1101(5th Cir. 1982)	18-19 21
Heverly v Lewis 99 F.R.D. 135, 136 (1983)	18-19
Miller v Prudential Ins. Co. 362 A2d 1017	20
Pan American Life Ins. Co. v Manusco 186 So2d 339	20
Person v Association of Bar (1977 CA2 N.Y.) 554 F2d 534 Cert. Den. 434 U.S. 924, 54 L Ed 2d 282 98 S.Ct. 403	15
State Ex. Rel. Spillman v First Bank of Nickerson 114 Neb. 423 207 N.W. 674	14
Studiengesellschaft Kohle MBH v Eastman Kodak Co. 713 F2d 128 (5th Cir. 1983)	11

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	0-0
TABLE OF CITATIONS	i-ii
SWORN PETITION FOR WRIT OF CERTIORARI	1-27
CERTIFICATE OF SERVICE	28
APPENDIX A	29
APPENDIX B	30

STATUTES PAGE

Title 28 U.S.C. par 1254 (1) 2

Title 23 U.S.C. par 1332 3

OTHER REFERENCES

American Jurisprudence 2nd Vol. 81 Page 51 14

American Jurisprudence 2nd Vol. 14, Page 843 16

American Law Reports Vol. 45 Page 1418 14

Disciplinary Rule 7-109 (c) of Professional Responsibility, 33 Fed Proc. L Ed page 572 (par 80:205, 80-204) 15

Federal Procedures L Ed Vol. 33 page 572 15-20-21

Federal Rule of Civil Procedure 54 (d) 18

Fla. Jur. 2d page 331, Vol. 9 16

Moore's federal Procedure Vol. 7 60.23 (4), 60.30 (2) 23

Restatement of the Law (Contracts Sections 347-End Vol. II (1932) page 572 16

To the Honorable, the Chief Justice and associate Justices of the Supreme Court of the United States:

Dr. Mahfouz El Shahawy, the petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on April 18,1985. Motion for rehearing denied on May 21, 1985, (App. A,original lodged with clerk)

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered without express opinion, and entered on April 18, 1985. That judgment was a "per-curiam affirmed" judgment and is printed in Appendix B.

The Journal entry of the order of August 3, 1984 filed August 3, 1984 of the United States District Court for the Middle District of Florida seen on the docket of the District Court, (App.3-10 lodged with the Clerk).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit (Appendix B) was entered on April 18, 1985. A timely petition for rehearing was denied on May 21, 1985 (Appendix A). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE AND FACTS

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Middle District of Florida was (28U.S.C.1332) diversity of citizenship between the plaintiff and the defendant at the time the action was filed. The plaintiff at the time the action was filed was a citizen of the State of Florida and the Defendant was at that time a citizen of the State of Alabama.

Plaintiff brought an action against the defendant the essence of which action was that the defendant, Dr. Elliott, a radiologist, wronged the plaintiff, a cardiologist, by false testimony at a hearing to determine plaintiff's qualifications to perform an invasive procedure called cardiac catheterization at Sarasota Memorial Hospital on October 21, 1980. Plaintiffs only acquaintance with defendant was limited to the time

between July 1973 and December 1975 when both were employed as faculty members at the University of Florida at Shands Teaching Hospital in Gainsville Florida. At the time the defendant was a member of the Division of Radiology and the plaintiff was an assistant professor in the Division of Cardiology. During the period from July 1973 to January 1974 plaintiff was the Director of the Adult Catheterization Laboratory at said university. This laboratory was physically located in the Department of Radiology. Defendant Dr. Elliott had had a long-standing fight with the Division of Adult Cardiology in order to gain control of the Adult Cardiac Cath. Lab. Plaintiff upon assumption of his position as Director of the Cath. Lab. at the university resented along with the rest of the faculty members of the Division of Cardiology, the defendant's continued effort to gain control over

the Adult Cardiac Catheterization Lab. These facts led to continuous misunderstandings and unpleasant working conditions in the Cardiac Cath. lab., which required at times intervention of the Chief of Staff and the Dean. This misunderstanding was well known to some members of the Sarasota Memorial Hospital staff who wanted to keep plaintiff out of the Cath. Lab.; so they called upon Dr. Elliott to come testify on their behalf. Dr. Elliott, who in the interim left the University of Florida and was practicing in Alabama, accepted quickly their invitation to testify on events alleged to have taken place in the Cardiac Cath. Lab. in January 1974 while plaintiff was in charge. Subsequent investigations however by the Credentials Committee of Sarasota Memorial Hospital did not support defendant's statements as evidenced in their reports of 5/13/80

and 5/15/89 (App. 11-13, lodged with the clerk). this recommendation was approved by the executive commitee at it's regular meeting on May 19, 1980 (App. 14, lodged with the Clerk). Still defendant Dr. Elliott had the temerity to come and testify falsely before the Sarasota County Public Hospital Board hearing on October 21, 1980. Even members af the Board at the time who sat as a jury recognized his intention and thought his testimony was not worth belief, as noted at the end of the hearing during the Board deliberation on October 22, 1980, Hearing Transcript (App. 15-40, lodged with the Clerk). Board member Mr. Rand:

> I realize that Dr. Curry's testimony and Dr. Daicoff's testimony I was very much impressed with their professional atmosphere than I was with the other folk (App.22 lodged with the Clerk).

Hospital Board member Mrs. Balis:

> Dr. Curry and Dr. Daicoff- they

all said he was compatent and adequate, and that's what I have to go on (App. 24-25, lodged with the Clerk).

Hospital Board Member Mr. Hereford:

I think that Dr. El Shahawy was treated very shabbily in this whole thing...(App. 28, lodged with the Clerk). I thought Dr. Cooper and Elliott were beauts (App. 30, lodged with the Clerk) ...They wrote letters, I think their testimony was a classic exhibition of the value of the hearsay rule. Both exhibited obvious bias against Dr. Shahawy. I think Elliott is a blow-hard, political type of college faculty member, he was Shahawy's rival.... He was Shahawy's rival at the University of Florida. He rose from the ranks stepping on his head, if that be the case. He had personal --he utilized whatever he did for personal gain as far as I'm concerned. And I think Cooper was an insidious smart alleck, and he had personal gain because he got the status of replacing Dr. Shahawy as the head of the Adult Catheteriziation while he was still a fellow in training. So he got some personal gain there, and I bet you he's exploited that from there on. I don't think either one of them are credible witnesses. I think their testimony was impeached very nicely tonight by a couple of witnesses that showed a great deal of credibility.

Hospital Board Member Balis:

I think personalies are in it more than qualifications. That's

the thing that bothers me the most ---I know you try and separate it, but it's in there (App. 36, lodged with the Clerk).

Hospital Board member Mr. Tolerton:

No one will deny that Dr. Shahawy is qualified to do the procedure (App. 38, lodged with the Clerk).

Hospital Board member Greenwald:

I just said I wanted to deny this six months (App. 39, lodged with the Clerk).

Hospital Board member Dr. W. Chapman:

As for the testimony of Dr. Cooper and Dr. Elliott I wasn't too impressed with it (App. 18, lodged with the Clerk).

After the Board hearing plaintiff filed this suit against defendant for his alleged false testimony. Furthermore plaintiff has obtained his records from the University of Florida during the discovery of this suit.

Again this record did not support defendant's allegation as shown - to the lower court during the trial. Defendant then for the third time at the time of trial presented a different and false testimony and tried to plead with the trial judge for qualified privilege. The defendant's testimony was false as shown by the record in the courts file.* Furthermore the record shows that the defendant paid no costs or legal expense of this action and that his costs and legal expenses were paid by the Sarasota county Public Hospital Board and an insurance company, as evidenced by the bill of costs in the courts file.**

The defendant has not proven or alleged that he has incurred any obligation that he repay his indemnitors in all events or even if costs were taxed against the plaintiff Dr. Shahawy. The defendant's counsel submitted a perjured bill of costs for $13,296.75.

*(App. 41-91, lodged with the Clerk).
**(App. 92-96, lodged with the Clerk).

The District Court Clerk however taxed costs against plaintiff for 6062.85 dollars. By final order made and filed on August 3, 1984, the district judge denied plaintiff's motion for relief from Clerk's taxation of costs (App.* lodged with the Clerk.) A timely notice of appeal of that order of August 3, 1984 was filed on September 5, 1984 along with Briefs (App. 105-148 Lodged with the Clerk.) The Appellate Court affirmed that order on April 18, 1985 without express opinion and denied petition for rehearing on May 21, 1985 (App.A).

While reviewing the bill of costs plaintiff pro-se discovered new evidence of conspiracy between defendant and officials of Sarasota County Public Hospital Board who were and are defendants in a related case in the Federal Court System (Case No. 83-3650). Shahawy v. William T. Harrison et. al.,

*(App. 97-104)

and a Certiorari currently pending in the Supreme Court (Case No. 84-2036.)

Furthermore, plaintiff discovered the excessive payments by the Hospital Board which were paid to witnesses on behalf of the defendant such as Dr. Chinoy who was not an expert witness, who was paid over 4,000 dollars for less that one-half hour of a perjured testimony at the trial court. Other perjured testimonies on behalf of the defendant for which the witnesses were reimbursed by the Hospital Board involved technician Jeanette Frierson, Chuck Cooper, Dr. Kelly and others. All this evidence on the bill of costs which is part of the court file (App. * lodged with Clerk.) Plaintiff pro-se could not have discovered this evidence prior to review of the bill of costs. Plaintiff then filed a timely motion to vacate the Clerk's taxation of costs of June 12, 1984 which was again denied * (App. 92-96)

(App.105-106 lodged with the clerk). Subsequently plaintiff appealed the case and again asked to vacate the clerks taxation of costs on June 1984 and to remand the case to the District Court for a new trial by jury based on newly discovered evidence of fraud and conspiracy, or alternatively to stay the case herein pending completion of related suits and investigation by state and federal authorities. this request again was denied (App.149-152 lodged with Clerk) The record which is currently in the Court's possession is replete with evidence to support the fact of the abuse of the power of the office by some officials of Sarasota Memorial Hospital Board on supporting the defense of the defendant for personal vendetta.

REASONS FOR GRANTING WRIT

The record in this case shows that the defendant Dr. Elliott did not pay any of the costs in this action;that the

costs were paid by the Sarasota County Public Hospital Board and by an insurance company as alleged in Dr. Shahawy's pleadings and documented in the Court's file.

Dr. Elliott has not proven or even alleged that he has incurred any obligation that he repay his indemnitors in all events or if costs are taxed against Dr. Shahawy and it was incumbent on him to go forward forthrightly and disclose all the details of his agreement regarding indemnification of his legal expense to the court where such illegal maintenance was alleged by Dr. Shahawy. The Hospital Board and insurance company, which did not even insure the defendant, had no legal right to reimburse Dr. Elliott for his legal expense in this action. A special contract to pay to any ordinary witness amendable to process more than the regular fee is nonenforceable for want

of consideration. Moreover, because the contract offers enticement to perjury and tends thereby to pervert the course of justice, it is contrary to public policy and void. 81 AM Jur 2d 51; State EX.REl. Spillman v First Bank of Nickerson 114 Neb 423, 207 N.W. 674, 45 ALR 1418.

Similarly, the fee of an expert witness retained by a party may be decided by a contract between them, provided "That a lawyer shall not pay, offer to pay,or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case, although a lawyer may advance, guarantee, or acquiesce in the payment of:

1. Expenses reasonably incurred by a witness in attending or testifying.
2. Reasonable compensation to a witness for his loss of time in attending or testifying.

3. A reasonable fee for the professional services of an expert witness" as provided by disciplinary rule 7-109(c) of the Code of Professional Responsibility upheld by Person v Association of Bar (1977 CA2 NY) 554 F2d 534 cert.den 434 &S924, 54 Led 2d 282, 98.SCl.403. 33 Fed Proc, LED page 572 (pat 80:205 and 80:204)

The Hospital Board's agreement to indemnify Dr. Elliott for any legal costs he might incur as a result of his testimony regarding Dr. Shahawy was unreasonable, particularly in view of their conclusion about Dr. Elliott's false testimony at the end of the hearing of October 22, 1980, and therefore in violation of the aforestated Rule 7-109(3) of the Code of Professional Responsibility, because that agreement falls within the modern difinition of maintenance because it

obstructs justice by inciting perjury by relieving the witness from the financial burden of defending himself from a suit in case he testifies wrongfully, 9 Fla Jur 2d page 331. 14 AM Jur 2d 843.

The restatement of the Law (Contracts sections 347 End Vol II (1932) 572) states " A bargain to indemnify another against the consequences of committing a tortious act is illegal unless the performance of the tortious act is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce his false testimony as set forth above."

If Dr. Elliott promised to repay the Hospital Board for having paid his costs, in the event costs were taxed against Dr. Shahawy, that would have the effect of both the Hospital Board and Dr. Elliott being relieved of the financial consequences, (legal expenses) attendant on Dr. Shahawy's suit against

Dr. Elliott. That also would be part of the illegal, systematic joint action which succeeded in excluding Dr. Shahawy from the heart catheterization laboratory at Memorial Hospital. It is Hornbook law that neither party to such an illegal contract has enforecable rights where they are in part delicto, that is to say Dr. Elliott could incur no legally enforceable liability to repay his indemnitors where both parties are in pari delicto. But if Dr. Elliott were ordered by the Court to pay back the Hospital Board on the grounds of his greater culpability, because jurisdiction to award costs on District Courts grew out of the Court's equity jurisdiction and follows equitable principles, in no event should Dr. Elliott's costs consequent on his false testimony be taxed against Dr. Shahawy, especially in view of Dr. Elliott's postulated, greater culpability and the illegal maintenance contract

which tends to induce false testimony. Dr. Elliott's hands are dirty. To have standing in equity Dr. Elliott's hands must be clean therefore he has no right to ask this Court which follows equitable principles to sustain the District Court which awarded him costs.

F.R.C.P. Fed R Civ-54 (d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs..." Thus, the Court has discretion to allow or disallow expenditures ordinarily recoverable as costs of suit, but it may not either reduce or increase the amount of the costs from those reasonably and actually incurred by the prevailing party see Heverly v Lewis 99 F.R.D. 135, 136 (1983); Cooper Liquor, Inc. v Adolph Coors 684F2d 1087 1101 (5th Cir. 1982). Both under the Law of Florida City of Boca Raton v Boca Village Corp. (Fla App) 372 50 2d 485 and under rule 54 (D) of the Federal Rules of Civil Procedures, costs are in the nature of indemnification Heverly v Lewis Supra; Cooper Liquor v Adolph Coors Supra.

Judges only have discretion to award, (that is to say to indemnify for) costs actually incurred and it is an abuse of discretion to award costs to a defendant who has incurred no liability to pay costs and has paid no costs. Heverly v Lewis Supra; Cooper Liquor, Inc. v Adolph Coors Supra; City of Boca Raton v Boca Village Corp. Supra.

Even if Dr. Elliott has promised to repay the Hospital Board if costs are assessed against Dr. Shahawy, because Dr. Elliott has dirty hands as set forth above, the equitable principle that he who seeks recourse from a court in equity must come into court with clean hands prevents the court from awarding him costs. Because costs under rule 54 (D) of the Federal Rules of Civil Procedure are in the nature of an indemnification (Heverly v Lewis Supra.) It is fraud on the court and on Dr. Shahawy that Dr. Elliott has asked the court for allowance of his costs where he has neither paid or incurred any liability to pay any costs of this action as aforestated by virtue of his contract of indemnity

with the Hospital Board which has paid all his costs. Any such request for over-reimbursement is considered fraudulent and unjust. Pan American Life Ins. Co. v Mancuso 186 502d 339; Miller v Prudential Ins. Co. 362 A2d 1017 43 Am Jur 2d page 1106.

This court should exercise its' discretion and grant a writ of certiorari because the Appellate Court santioned an extreme departure from the accepted and usual course of judicial proceeding by the Trial Court which abused its' discretion in awarding costs to a defendant who paid no costs and incurred no liability to pay costs and should grant a writ of certiorari because such a request for over-reimbursement for costs is considered fraudulent and unjust as aforesaid. This court has not decided but should decide the important question whether under Rule 54d of the Federal Rules of Civil Procedure the courts have discretion to award costs to a party who has neither paid nor incurred liability to pay costs of an action.

This court should grant a writ of

certiorari because the Appellate Court's decision in affirming the District Court's award of costs to the defendant who paid no costs and incurred no liability to pay those costs is in conflict with Cooper Liqour, Inc. v Adolph Coors 684 F2d 1087 1101 5th Cir 1982.

The Appellate court erred by denying appellant's motion to vacate the award of costs and remand for jury trial on the basis of newly discovered evidence. This was a departure from the usual course of judicial proceedings and sanctioned the unjust judgment of the trial judge which had imposed costs on appellant in favor of a defendant who had testified falsely against appellant under circumstances proving his malice (App. 41-90, lodged with the clerk).

Appellate Court's denial of plaintiff's motion to remand for a new trial in view of the evidence of new discovery is inconsistant with rule 60 (b) (2) Federal Rules of Civil Procedure which provide in relevant part that:

> "on motion and upon such terms as are just, the court may relieve a party... from a final judgment,... for ... (2) newly discovered evidence which by due

> diligence could not have been discovered in time to move for a new trial under rule 59 (b);...

Appallent could not have discovered prior to review of bill of costs even with due diligence that Sarasota County Public Hospital Board who had filed a Motion with the District Court on September 16, 1981 as non-party (App. 4, lodged with the clerk) was the entity who had been maintaining the defense of defendant Dr. Elliott, who is not even a member of the medical staff of Sarasota Memorial Hospital and who also was found by the Board to be not worthy of belief at it's hearing on October 21, 22, 1980 (App. 18, 22, 30, lodged with the clerk). The fact that Sarasota Memorial Hospital Board became a party of a related suit which is currently in this Court does not give them the power to abuse public funds in maintaining Dr. Elliott's defense for personal reasons. This abuse of the public funds of Sarasota County taxpayers by the Hospital Board in maintaining the defense of Dr. Elliott for personal reasons should not be sanctioned by the Court. The

Appeal court ruling on this matter was in conflict with established case law 7 Moore's Federal Practice 60.23(4) and cases sited herein.

In view of the above and persuant to Rule 17 (a, c) of the Supreme Court's Rule, plaintiff feels that certiorari should be granted and the case should be remanded for a new trial before a jury. It is Hornbook Law that such fraud practiced on any court is grounds for any court to set aside at any time such unjustified judgment.

CONCLUSION

Based on the forgoing facts and authorities the plaintiff would like to assert the following:

1. Dr. Elliott did not pay one cent of the bill of costs nor any other expenses in this case; rather, it was paid fully by Sarasota Memorial Hospital Board and an insurance company, PIMCO, which covers other physicians involved in related litigation in this Court as well s the State Court. It is of interest to note that PMICO was not insuring Dr. Elliott. Those payments were improper and amount to conspiracy and fraud.

2. It should not be overlooked by the Court that defendant's counsel has presented an improper bill of costs signed by him under penalty of perjury, and also has provided perjured testimony by witnesses called by the defense.

3. A payment of $4625.00 from the Sarasota County Public Hospital Board's funds to Dr. D. Chinoy, a former student, a non-expert

witness, to come from Jacksonville to Tampa for one-half hour of testimony (which was perjured) is definitely unlawful and a fraud of Sarasota County taxpayer's money. This should not be left unpunished.

4. The bill of costs, which has been paid by the Sarasota Memorial Hospital Board and not by defendant Elliott, represents not only money spent in this case but in at least three other related litigations referred to above which are still pending in state and federal Courts.

5. Sarasota county Public Hospital Board has abused the power of the office in allowing such expenses for Dr. Elliott whose link with related cases should be recognized pending completion of litigation questioning his conduct.

6. Newly discovered evidence shows beyond any doubt that as a result of the conspiracy and scheming between defendant Dr. Elliott and officials of Sarasota Memorial Hospital Board and others, plaintiff's privileges at Sarasota Memorial Hospital to practice medicine were

unlawfully revoked, in violation of plaintiff's civil and constitutional rights.

7. Newly discovered evidence should revove any shred of doubt that scheming and conspiracy between Dr. Elliott and other parties has resulted directly and indirectly in non-renewal of plaintiff's privileges by the Sarasota County Public Hospital Board; in spite of the fact that petitioner's training and credentials in the field of cardiology and internal medicine exceeds those required from any physician currently practicing at said hospital (App. 152-159, lodged with the clerk). This unlawful conduct was in violation of plaintiff's civil rights and in in violation of the United States Constitution. Plaintiff feels that Dr. Elliott is fully responsible for the injustice which was done and this case should be remanded for new trial before

a jury.

Based on the foregoing, plaintiff prays this Court to grant the certiorari and stay the mandate for costs until the case has been heard on its' merit.

Respectfully submitted,

MAHFOUZ EL SHAHAWY, M.D.
Plaintiff/Appellant Pro Se
1851 Arlington Street
Suite 206
Sarasota, Florida 33579
(813) 366-9800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished by mail to defendant Dr. Larry Elliott and his counsel Mr. Frank E. Strelec Esq. and Clare L. Hamner Esq. P.O. Box 3979 Sarsota, Florida 33578, Charles Johnson M.D., Chairman Sarasota County Public Hospital Board, Sarasota Memorial Hospital, 1700 Tamiami Trail, Sarasota, Florida 33579, Department of Justice, Washington D.C., and Mr. Philip Beauchamp, Administrator, Sarasota Memorial Hospital, 1700 Tamiami Trail, Sarasota, Florida 33579, this 16th day of August 1985.

M. El SHAHAWY, M.D., Petitioner Pro Se
1851 Arlington Street, Suite 206
Sarasota, Florida 33579
(813) 366-9800

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCIBED TO ME THIS 16th DAY OF AUGUST, 1985, AND BEFORE ME PERSONALY APPEARED MAHFOUZ EL SHAHAWY, M.D., TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC

My Commission Expires:

2/13/86

APP. A

MAHFOUZ EL SHAHAWY, M.D.

Plaintiff-Appellant,

versus

LARRY P. ELLIOTT, M.D.

Defendant-Appellee

- - - - - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING

(May 21, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APP. B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3618
Non-Argument Calendar

D.C. Docket No. 81-545

MAHFOUZ EL SHAHAWY, M.D.,

Plaintiff-Appellant,

v.

LARRY P. ELLIOTT, M.D.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 18, 1985)

Before FODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

Judgment Entered: April 18, 1985
For the Court: Spencer D. Mercer, Clerk

By:_____,
Deputy Clerk

ISSUED AS MANDATE:

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-318

In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

v.

LARRY P. ELLIOTT, M.D.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

G. Hunter Gibbons
(Counsel of Record for
Respondent Elliott)
and Claire L. Hamner
Dickinson, O'Riorden, Gibbons,
Quale, Shields & Carlton, P.A.
P.O. Box 3979
Sarasota, Florida 33578
(813) 366-4680
Attorneys for Respondent Elliott

BEST AVAILABLE COPY

15pp

QUESTION PRESENTED FOR REVIEW

This case concerns a Bill of Costs awarded to Respondent Elliott as the prevailing party in a defamation suit brought by Shahawy. The question presented is:

1. Whether the Per Curiam Affirmance of the Eleventh Circuit erroneously decided the issue before it of whether the United States District Court Middle District of Florida abused its discretion in affirming the Clerk's taxation of a Bill of Costs against Shahawy.

CERTIFICATE OF INTERESTED PERSONS AND PARTIES

TRIAL JUDGE:	WILLIAM J. CASTAGNA
ELEVENTH CIRCUIT PANEL	GODBOLD, KRAVITCH and HATCHETT
PARTIES:	MAHFOUZ EL SHAHAWY, M.D. LARRY P. ELLIOTT, M.D.
COUNSEL:	G. Hunter Gibbons (counsel of record) Claire L. Hamner DICKINSON, O'RIORDEN, GIBBONS, QUALE, SHIELDS & CARLTON, P.A. P.O. Box 3979 Sarasota, Florida 33578 MAHFOUZ EL SHAHAWY, M.D., pro se 1851 Arlington St. Sarasota, FL 33579

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	I
TABLE OF INTERESTED PERSONS	II
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT - REASONS FOR DENYING WRIT	5
A. The petition seeks review of a judgment in Case No. 8 3154 which was final on May 31, 1984; as such the petition is untimely	5
B. Shahawy's brief does not conform to Rules 21.5 and 34.6	5
C. The petition seeks review of factual determinations particular to this case alone	7
D. Settled principles of law support the Court's judgment	9
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Page

Cases

Conway v. California Adult Authority, 396 U.S. 107 (1969) 6

Dasher v. Mutual Life Insurance Company of New York, 78 F.R.D.142 (S.D. Ga. 1978) 7

Davis v. Jacobs, 454 U.S. 911 (1981) 6

General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175 (1930) 7,8

Jenkins v. State, 385 So.2d 1356 (Fla. 1980) 8

National Labor Relations Board v. Pittsburg S.S. Co., 340 U.S. 498 (1951) 7

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) 6

Parker v. Texas, 267 U.S. 604 (1925) 4

Shahawy v. Elliott, 81-545 (U.S. District Court, Middle District of Florida, Tampa Division); 83-3154 and 84-3618 (U.S. Court of Appeals for the Eleventh Circuit, Atlanta, Georgia) 2

State of Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 5

United States v. Johnston, 268 U.S. 220 (1925) 7

United States v. Kolesar, 313 F.2d 835 (5th Cir. 1963) 6,7

Statutes

28 U.S.C. §1201, §1254 (1) and §1920 2,5,6

Rules

Supreme Court Rules 17, 21.5 and 34.6 4,5,9

In the

Supreme Court of the United States

October Term, 1985

No. 85-318

MAHFOUZ EL SHAHAWY, M.D.,

v.

LARRY P. ELLIOTT, M.D.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT ELLIOTT IN OPPOSITION

OPINIONS BELOW

The decision of the Eleventh Circuit in Case No. 84-3618 which Shahawy seeks review of is an unpublished per curiam affirmance without opinion entered April 18, 1985, in Case No. 84-3618, Non-Argument Calendar, D.C. Docket No. 81-545. Rehearing was denied May 21, 1985 and the unpublished order denying rehearing was filed in the Eleventh Circuit on May 21, 1985. Mandate was issued May 31, 1985 (Res. App. 1-2).

The appeal was taken from an order of Judge Castagna's affirming the Clerk's award of a Bill of Costs in the amount of $6,062.85. (Res. App. 3).

The decision of the Eleventh Circuit in Case No. 83-3154 which Shahawy seeks review of is an unpublished per curiam affirmance without opinion entered March 20, 1984, mandate issued May 31, 1984. (Res. App. 5). That appeal was taken

from an unpublished opinion in favor of the Defendant Elliott (Res. App. 6) and a final judgment entered December 22, 1982.

JURISDICTION

The Eleventh Circuit Court of Appeals in Case No. 84-3618 entered its order on April 18, 1985. Rehearing was denied May 21, 1985. The mandate was issued May 31, 1985. (Res. App.1-2). Petitioner Shahawy asserts jurisdiction in this court is derived from 28 U.S.C. 1254 (1).

In Case No. 83-3154, the decision by the Eleventh Circuit was entered March 20, 1984; mandate was issued May 31, 1984. (Res. App. 5). No request for an extension of time to file a petition for writ of certiorari from this decision was requested and none was given.

STATEMENT

The genesis of the appeal before the Eleventh Circuit which forms the basis of Shahawy's petition to this Court lies in the Complaint filed by Shahawy against Elliott on June 12, 1981. (R2. pp. 1-8)[1] Following a non-jury trial, the middle district court of Florida wrote an opinion finding in favor of the Defendant Elliott. (*See, Shahawy v. Elliott,* 81-545-Civ.-T-WC, M'film No. 83, document 5816; R2. pp. 535-548; Res. App. 6).

Final judgment in favor of Elliott was entered on December 22, 1982. Following an appeal, the Eleventh Circuit entered a per curiam affirmance without opinion. (R1. 73. Res. App. 5).

Elliott filed a Bill of Costs with the middle district court seeking costs as the prevailing party. (R1. 89; Res. App. 4).

---

1 References to R1. are to the Record on Appeal in Case No. 84-3618, which was returned to the United States District Court for the Middle District of Florida on May 31, 1985. References to R2. are to the Record of Appeal in Case No. 83-3154, returned to the United States District Court for the Middle District of Florida in 1984.

On June 12, 1984, Hon. William J. Castagna, the district judge, entered an order denying the Plaintiff's motion to strike the Bill of Costs. (R1. 721; Res. App. 3). In this order, Judge Castagna stated he had reviewed the costs as taxed by the clerk and found them appropriate (R1. 72; Res. App. 3).

In August of 1984, Judge Castagna entered an order in which he denied Shahawy's motion for relief from the clerk's taxation of costs and denied his motion to review the clerk's taxation of costs. (R1. 93). Plaintiff's request that the court stay any further ruling in this matter until other litigation involving Shahawy was resolved was also denied. (R1 94).

Shahawy filed a notice of appeal to the Eleventh Circuit from that order. (R1. 956). The order was affirmed without opinion and the mandate issued May 31, 1985. (Res. App. 1).

The costs which were awarded to Elliott include the following:

$8.00 paid in fees to the clerk (R1. 8; Res. App. 4);

$168.12 paid for the service of subpoenas. (R1. 8-9; Res. App. 4);

$672.00 for fees of the court reporter for use in obtaining transcripts necessary for use in the case (R1. 8-9; Res. App. 4);

$300.51 in fees and disbursements for printing (R1. 8-9; Res. App. 4);

$1,286.01 in fees for witnesses (R1. 8-10; Res. App. 4);

$1,045.89 for fees for copies of papers necessarily obtained for use in the case (R1. 8, 10; Res. App. 4);

$2,582.32 for costs incidental to the taking of depositions. (R1. 8, 10-11; Res. App. 4);

The total amount of costs awarded Elliott was $6,062.85. (R1. 8; Res. App. 4).

SUMMARY OF ARGUMENT

The petition for writ of certiorari from Case No. 83-3154 is filed from a judgment finalized in May of 1984. The petition

is untimely and should be denied.

Shahawy's petition from Case No. 84-3618 requests this Court to exercise its discretionary review to re-examine an award of a Bill of Costs for $6,062.85 to Elliott, the prevailing party in the underlying defamation case. Review by this Court of the Bill of Costs is unwarranted and does not meet any of the enumerated criteria under Rule 17, Rules of the Supreme Court of the United States. No question of great public importance is raised; no glaring inconsistency or conflict between the federal circuits is established and no unsettled issue of great public importance is raised; no glaring inconsistency or conflict between the federal circuits is established and no unsettled issue of great importance is presented by Shahawy's petition from a Bill of Costs. Further, the decision below was in conformity with established statutory and case law. The Eleventh Circuit did not deem the appeal worthy of either oral argument or a written opinion. (Res. App. 1).

ARGUMENT

REASONS FOR DENYING WRIT

A. The Petition Seeks Review Of A Judgment In Case No. 83-3154 Which Was Final On May 31, 1984; As Such The Petition Is Untimely.

Shahawy attempts to relitigate issues of fact settled against him in the underlying defamation suit, Case No. 83-3154. The decision against Shahawy and in favor of Defendant Elliott became final with the per curiam affirmance, denial of rehearing and the issuance of the mandate in Case No. 83-3154, in the Eleventh Circuit. (Res. App. 5). The mandate in Case No. 83-3154 was issued May 31, 1984. (Res. App. 5). As such the issues relative to that case cannot be reviewed via Shahawy's petition for writ of certiorari filed August 16, 1985, because the time has run to review the 1984 decision. *See*, 28 U.S.C. §1201. *C.f.*, *Parker v. Texas*, 267 U.S. 604 (1925) (memorandum decision) holding petition dismissed as untime-

ly; and *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950) observing certiorari may be denied where untimely filed.

Shahawy's petition for a writ of certiorari to review Case No. 83-3145 should be denied as his petition was filed one year and two and one-half months after the decision he seeks review of.

B. Shahawy's Brief Does Not Conform To Rules 21. 5 and 34.6.

Any possible review of this Court is limited solely to the Bill of Costs. The questions and allegations addressed to alleged perjured testimony during the defamation trial, whether Elliott's statement had a qualified privilege (issues pertaining to the defamation trial), and whether Elliott participated in an antitrust conspiracy (a new issue not raised below) (Questions II-VI, Re: Dr. Shahawy's petition, p. 0) are patently beyond the scope of his petition. Rule 21.5, Rules of the Supreme Court of the United States, alone provides reasons why this Court should deny the petition as the petitioner has failed to present with accuracy, brevity, and clearness whatever is essential to his petition for a writ of certiorari to review a Bill of Costs judgment.

As the merits of the underlying defamation case are not properly before this Court, there is no need to elaborate upon the inadequate portrayal of the facts in Shahawy's Statement. One example should suffice. Shahawy maintains Dr. Chinoy presented "perjured" testimony. Yet the trial judge specifically found Dr. Chinoy "a highly credible witness." (Res. App. 6E). The facts of the underlying defamation case are presented in the trial court's written opinion (Res. App. 6) and the Eleventh Circuit's affirmance establishes there was record support for these findings of fact. Shahawy's version of the facts, containing unsupported accusations of perjury by witnesses and an attorney of record, brings Shahawy perilously close to violation of Rule 34.6, Rules of the

Supreme Court of the United States. This rule prohibits burdensome, immaterial and scandalous matter. Further, Shahawy's omission of certain facts and mischaracterization of others constitutes reason for denying certiorari. *Conway v. California Adult Authority,* 396 U.S. 107 (1969); c.f., *Davis v. Jacobs,* 454 U.S. 911 (1981).

C.The Petition Seeks Review Of Factual Determinations Particular To This Case Alone.

The only real issues raised by an appeal from a Bill of Costs are whether the applicable statute 28 U.S.C. §1920 was complied with and factual questions addressed to whether the items were reasonable and necessary.

A brief review of the items discussed in Elliott's Statement, items found in the appellate record of Case No. 84-3618 at 4-72, 93-94; (documentation for the costs is at pp. 4-71) and in Respondent's Appendix at page 5 illustrate these items are recoverable under the clear language of 28 U.S.C. §1920. As 28 U.S.C. §1920 is specific and the case law well settled, there is no discernible reason for this Court to grant certiorari to review a settled area of law.

Any factual questions concerning the Bill of Costs are factual questions particular to this case alone. *See, Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 640 (6th Cir. 1979) holding the test for a correct award of costs is whether the trial court deemed the items "reasonable and necessary." This is a factual question. *United States v. Kolesar,* 313 F.2d 835, 839 (5th Cir. 1963).

Such narrow factual questions are of little interest to anyone except the parties to this suit. In essence, Shahawy asks this Court to make a third review of the appellate record and documentation relative to the awarded costs to see if this Court can discover some error the Eleventh Circuit and the United States District Court Middle District of Florida were unable to discover. This Court has held: "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). It is without dispute that factual determinations by the trial court in an appeal from a Bill of Costs are awarded great deference. *E.g., United States v. Kolesar, supra*, 313 F.2d at 839. Review by this Court is particularly unnecessary under the criteria mentioned in Rule 17, Rules of the Supreme Court of the United States. *See also, National Labor Relations Board v. Pittsburg S. S. Co.*, 340 U.S. 498, 502 (1951) holding certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal; and *General Talking Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1930) holding the writ will not be granted to review the evidence or inferences drawn from it.

Shahawy also seeks review of an order denying his motion for a new trial based upon newly discovered evidence. A motion for a new trial upon newly discovered evidence raises only questions of fact particular to the parties and having no general public importance. Under the clear dictates of *United States v. Johnston, supra; National Labor Relations Board v. Pittsburg S. S. Co., supra;* and, *General Talking Pictures Corporation v. Western Electric Company, supra*, a writ of certiorari will not be issued to review factual issues or to review evidence.

D. Settled Principles Of Law Support The Court's Judgment.

Shahawy asserts that the Eleventh Circuit "sanctioned an extreme departure from the accepted and usual course of judicial proceedings" because it awarded costs to Elliott which were "over-reimbursement." But the amount of the award is a fact question, the determination of which is particularly within the province of the trial court, *e.g., United States v. Kolesar, supra*, and which presents factual issues

peculiar only to this case and not susceptible to review by this Court. *E.g., General Talking Pictures Corporation v. Western Electric Company, supra.*

Shahawy's second allegation of a grave departure based upon his allegation that Elliott did not personally incur the costs is without serious merit. *See, Dasher v. Mutual Life Insurance Company of New York,* 78 F.R.D. 142, 145 (S.D. Ga. 1978) holding the fact the insurance carrier "picked up the expense tab" did not preclude entry of an award of costs in the prevailing party's behalf. Shahawy argues in effect a conflict between the circuits is created as to this point. He cites no cases directly holding that a prevailing party is prohibited from an award of costs because an insurance company is involved in the case.

As a practical matter, a per curiam affirmance without opinion does not create any conflict between decisions of other circuits because there is no written opinion to generate conflict. *C.f., Jenkins v. State,* 385 So.2d 1356 (Fla. 1980) which, while decided solely on Florida law, illustrates the reasons why the Florida Supreme Court will not exercise its discretion to review a lower appellate court's per curiam affirmance without opinion upon grounds that a conflict exists.

Shahawy asserts the Eleventh Circuit and the Federal District Court erred in denying his motion to stay the Bill of Costs pending the outcome of other litigation in which Shahawy is a party. It was entirely correct for the trial court to refuse to stay the award of costs pending the outcome of other litigation which involves Shahawy. There is no question that Shahawy has several pending lawsuits. But Elliott is not a party to these other suits. Elliott is the "prevailing party" in the defamation case and is entitled to costs under both the Federal Rules of Civil Procedure and the Federal Statutes. Whatever the ultimate outcome of Shahawy's other litigation, Elliott will still be the "prevailing party" in this suit.

However unhappy Shahawy is with the result of his suit

against Elliott, however much Shahawy hopes for satisfaction against other parties in other litigation, Shahawy cannot change the fact that Elliott is the prevailing party in Case No. 83-3154 and is entitled to costs regardless of the other litigation.

There was no error and no viable reason for this Court to grant certiorari.

CONCLUSION

Shahawy has failed to establish any of the valid reasons discussed in case law from this Court or enumerated in Rule 17, Rules of the Supreme Court of the United States, which would justify this Court's attention via a writ of certiorari. Shahawy's petition, reduced to its legitimate scope, seeks review of a single Bill of Costs to the prevailing party in another suit. There being no federal question of great importance, no conflict between the circuits created by a per curiam affirmance without opinion, and no grave departure from established law, the petition for a writ of certiorari should be denied. Respondent Elliott requests that this Court so deny the petition.

Respectfully submitted,

/S/ G. Hunter Gibbons

G. Hunter Gibbons
Counsel of Record

/S/ Claire L. Hamner

Claire L. Hamner
Attorney

Dickinson, O'Riorden, Gibbons,
Quale, Shields & Carlton, P.A.
P.O. Box 3979
Sarasota, Florida 33578
(813) 366-4680

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 40 true copies of the foregoing has been furnished to the U.S. Supreme Court, 3 true copies to MAHFOUZ E. SHAHAWY, M.D., 1851 Arlington Street, Suite 206, Sarasota, Florida 33579, Certified Mail, Return Receipt Requested this 16th day of October, 1985.

/S/
G. Hunter Gibbons
Attorney

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-318 (4)

In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

vs.

LARRY P. ELLIOTT, M.D.,

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eleventh Circuit

APPENDIX
TO BRIEF FOR THE RESPONDENT IN OPPOSITION

G. Hunter Gibbons
(Counsel of Record for
Respondent Elliott)
and Claire L. Hamner
Dickinson, O'Riorden, Gibbons,
Quale, Shields & Carlton, P.A.
P.O. Box 3979
Sarasota, Florida 33578
(813) 366-4680
Attorneys for Respondent Elliott

Dated: October 16, 1985

BEST AVAILABLE COPY

23 pp

TABLE OF CONTENTS

	Page
PER CURIAM AFFIRMANCE OF BILL OF COSTS .	1
DENIAL OF MOTION FOR REHEARING	2
DISTRICT COURT'S ORDER ON COSTS	3
BILL OF COSTS AND ITEMIZATION	5
PER CURIAM AFFIRMANCE IN DEFAMATION ACTION	4
OPINION IN DEFAMATION SUIT	6
FINAL JUDGEMENT	7

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3618
Non-Argument Calendar

D.C. Docket No. 81-545

MAHFOUZ EL SHAHAWY, M.D.,

Plaintiff-Appellant,

v.

LARRY P. ELLIOTT, M.D.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 18, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

Judgment Entered: April 18, 1985
For the Court: Spencer D. Mercer, Clerk
By: /S/
Deputy Clerk

ISSUED AS MANDATE May 31, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

No. 84-3618

MAHFOUZ EL SHAHAWY, M.D.,

Plaintiff-Appellant,

versus

LARRY P. ELLIOTT, M.D.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING

(May 21, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D.,
Plaintiff,

vs. Case No. 81-545-Civ-T-WC

LARRY P. ELLIOTT, M.D.,
Defendant.

ORDER

The Court has for consideration Plaintiff's Motion to Strike Bill of Costs and Defendant's Response. The Court has reviewed the costs as taxed by the Clerk on June 11, 1984 and finds them appropriate. Therefore, it is

ORDERED:

1. Plaintiff's Motion to Strike Bill of Costs is denied.

DONE AND ORDERED AT Tampa, Florida this 12th day of June, 1984.

/S/
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

RECEIVED JUN 14, 1984

BILL OF COSTS

United States District Court DISTRICT
Middle District of Florida, Tampa Div.

MAHFOUZ EL SHAHAWY, M.D. DOCKET NO.
81-545-Civ-T-WC

v. MAGISTRATE CASE NO.

LARRY P. ELLIOTT, M.D.

Judgment having been entered in the above entitled action on December 22, 1982 against Mahfouz El Shahawy, M.D., Plaintiff (affd. per curiam 3/20/84) the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk		$8.00
Fees for service of summons and complaint	~~1004.87~~	168.12
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in this case _____		672.00
Fees and disbursements for printing .		300.51
Fees for witnesses (itemized on reverse side)	~~7015.60~~	1,286.01
Fees for exemplification and copies of papers necessarily obtained for use in case	~~1443.45~~	1,045.89
Docket fees under 28 U.S.C. §1923 .		-0-
Costs incident to taking of depositions	~~2852.32~~	2,582.32
Costs as shown on Mandate of Court of Appeals.		
Other costs (Please itemize)		
	Total~~$13296.75~~	6,062.85

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories. Briefs should also be submitted supporting the necessity of the requested costs and citing cases supporting taxation of those costs.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed with postage full prepaid thereon to; Michael C. Addison, Esq., 100 Twiggs St., Tampa FL 33601 and Bailey & Dawes, 2 S. Biscayne Blvd., Miami FL 33131

SIGNATURE OF ATTORNEY /S/
Frank E. Strelec

FOR: Larry P. Elliott, M.D. Date 5/4/85
Name of claiming party

Please take notice that I will appear before the clerk who will tax costs on the following day and time.	DATE AND TIME
Costs are hereby taxed in the following amount and included in the judgment:	AMOUNT TAXED $6,062.85

CLERK OF COURT (BY) DEPUTY CLERK		DATE
DONALD M. CINNAMOND	/S/	6/11/84

M'FILM ROLL #83
DOCUMENT #1213

ITEMIZATION FOR REQUESTED COSTS

1. *Fees of the clerk:*		
06/28/82 Certified copies	$ 6.00	
11/12/82 " "	2.00	
SUB-TOTAL		$ 8.00
2. *Fees for service of subpoenas and complaint:*		
02/11/82 El Shahawy (2) and Tyrity	$ 21.00	
09/13/82 Don Taylor & Associates	10.00	
11/06/82 French	7.00	
11/06/82 Tollerton	7.00	
11/06/82 Floyd	7.00	
11/06/82 Chapman	7.00	
11/06/82 Rand	7.00	
11/06/82 Hereford	7.00	
11/08/82 Baylis	7.00	
11/11/82 Locke, Reynolds, Boyd & Weisell	~~917.87~~ 81.12	
11/12/82 Greenwald	7.00	
SUB-TOTAL		~~$1004.87~~ 168.12
3. *Fees of the court reporter, etc.:*		
04/06/83 Transcript of Trial	$ 672.00	
SUB-TOTAL		$ 672.00
4. *Fees for printing:*		
11/03/82 Postal Instant Press	$ 300.51	
SUB-TOTAL		$ 300.51
5. *Fees for trial witnesses:*		
11/29-11/30/82 Dr. Chinoy - time & travel	~~$4625.00~~ 230.00	

	" "	
	- lodging	104.86
	" r. Chi	
	- lodging	80.35
11/14-11/19/82	Dr. Elliott	
	- travel	~~299.00~~
	" "	
	- travel, lodging	~~671.07~~
11/29-12/1/82	C. Cooper	
	- time & travel	~~327.00~~ 75.11
	" "	
	- lodging	132.29
11/30-12/1/82	G. Cooper	
	- travel	~~25.00~~
	" "	
	- lodging	151.57
11/30/82	J. Frierson	
	time & travel	~~181.73~~ 91.50
	" "	
	- travel	~~25.00~~ 22.76
12/01/82	T. French - lodging	63.13
	" "	
	- travel	~~25.00~~ 22.76
11/30-12/1/82	Dr. Kelley	
	- lodging	~~25.00~~ 22.76
	M. Baylis	
	- travel	~~25.00~~ 22.76
	W. Hereford	
	- travel	~~25.00~~ 22.76
	I Rand	
	- travel	~~25.00~~ 22.76
	W. Chapman	
	- travel	~~25.00~~ 22.76

J. Toilerton		
- travel	~~25.00~~ 22.76	
C. Williams		
- travel	~~25.00~~ 22.76	
H. Floyd		
- travel	~~25.00~~ 22.76	
SUB-TOTAL		~~$7015.60~~ 1286.01

6. *Copies of papers used for case:*

07/21/82	Documents at depositions	$ 96.75	
08/24/82	Articles from Sarasota newspaper	3.00	
09/09/82	Medical records from Shands	~~1272.10~~ 874.54	
09/10/82	Documents	71.60	
	SUB-TOTAL		~~$1443.45~~ 1045.89

7. *Docket fees:*
None.

8. *Costs incident to taking depositions:*

A.	*Witness fees:*	
	Dr. Chinoy	~~$ 300.00~~ 30.00
	Hantil Conners	30.00
	Dr. Robert Robinson	30.00
	Dr. William Nasser	30.00
	Steve Schumacher	30.00
	Katherine Waddy	30.00
	Richard Treloar	30.00
	Kathy Tyrity	30.00
	M. El Shahawy - 2/22/82	30.00
	" " 2/23/82	30.00

	SUB-TOTAL		~~$ 570.00~~ 300.00
B.	*Court reporters' fees:*		
	12/01/81 E.R. Harvey - (Dr. Cooper)	$ 148.68	
	01/11/82 " " -(Singleton,) (Green & Taylor)	128.75	
	01/24/82 D. L. Hoppe	165.30	
	02/16/82 Milton Rep. -(Dr. Elliott)	194.66	
	02/22/82 Vos & Vos -(Dr. El Shahawy) " "	312.95	
	02/23/82 " " " "	307.45	
	02/26/82 -(Kathy Tyrity)	202.95	
	07/21/82 Stewart Rep. -(Conner, Robert-) (son, Waddy and) (Schumacher)	481.60	
	08/20/82 E. W. Elliott -(C. Cooper)	185.56	
	09/02/82 J. O'Conner -(Dr. Frank)	40.00	
	09/03/82 Coffee et al -(J. Frierson)	58.82	
	09/03/82 C. Jennings -(Dr. Chinoy)	55.60	
	SUB-TOTAL		$2282.32
	TOTAL		~~$13296.75~~ 6062.85

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3154

D.C. Docket No. 81-00545

MAHFOUZ EL SHAHAWY, M.D.,

Plaintiff-Appellant,

versus

LARRY P. ELLIOTT, M.D.,

Defendant-Appellee.

Appeal from the United States District Court
For the Middle District of Florida

(March 20, 1984)

Before FAY, VANCE and HATCHETT, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

Judgment Entered: _____

For the Court: Spencer D. Mercer, Clerk

By: /S/

Deputy Clerk

ISSUED AS MANDATE: MAY 21, 1984

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D.,
Plaintiff,

vs. Case No. 81-545-Civ-T-WC

LARRY P. ELLIOTT, M.D.,
Defendant.

OPINION

This cause came before the Court on a non-jury trial on November 17-18, 29-30, and December 1-2, 1982. Plaintiff Mahfouz El Shahawy, M.D. filed this action against Defendant Larry P. Elliott, M.D., alleging that Defendant willfully and maliciously slandered and libeled Plaintiff, intentionally interfered with Plaintiff's business relaitonship, and negligently defamed Plaintiff. Plaintiff's cause of action arose out of facts surrounding Sarasota Memorial Hospital's denial to him of cardiac catheterization privileges in October of 1980. Plaintiff specifically alleged that Defendant's statements in a letter of February 13, 1980 to Dr. William Page, chairman of the hospital's cardiac cath lab standards committee, and Defendant's testimony before the Sarasota County Public Hospital Board on October 21, 1980 imputed characteristics to Plaintiff that were incompatible with the proper exercise of his profession and therefore constituted libel and slander per se.

M'FILM ROLL #83
DOCUMENT #5816

Additionally, Plaintiff contended that Defendant's written and oral statements proximately caused representatives of Sarasota Memorial Hospital to recommend that Plaintiff be denied cardiac catheterization privileges, and damaged Plaintiff's reputation in the community and among his professional

colleagues.

Plaintiff asserted that Defendant made the following statements either knowing of their falsity or without investigation as to their truth and with the malicious intent to injure the Plaintiff: that Plaintiff's technical abilities and judgment in performing cardiac catheterizations were substandard; that Plaintiff had not performed catheterizations in the six years between his resignation from the catheterization lab at Shands Teaching Hospital in Gainesville, Florida and the date of Defendant's letter to Dr (sic) Page; that Plaintiff's expertise and past performance indicated that he would not meet the current standards for physicians performing cardiac catheterizations; that Plaintiff's catheterization techniques at Shands Teaching Hospital of the University of Florida fell below accepted standards and quality for an invasive cardiologist; that Plaintiff, as a faculty member supervising physicians who were fellows in the cardiac cath lab, did not perform any catheterizations until one of the fellows went on vacation; that Plaintiff's cut-down on a patient's arm preparatory to inserting the catheter was messy and caused a wound to the patient; that Plaintiff's catheterization procedures were drawn out; that Defendant took steps to have Plaintiff suspended from the catheterization laboratory; and that Plaintiff did not properly perform his supervisory duties.

The Court has reviewed the testimony and exhibits presented at trial and makes the following findings:

(1) Plaintiff Mahfouz E. Shahawy, M.D. joined the faculty of the University of Florida as an assistant professor of medicine in the division of cardiology in July, 1973. His duties included directorship of the adult cardiology division of the cardiac catheterization laboratory. In the cardiac catheterization procedure catheters are introduced into arteries and veins under the skin near the elbow or groin. The physician advances the catheter through the blood vessels into the interior of the heart, and gathers information by taking

x-ray pictures of the vessels or heart chambers into which contrast dye has been placed through the catheter.

As a faculty member, Dr. Shahawy supervised physicians who were fellows in training. Generally, both a fellow and a faculty member, who was designated the attending physician, were assigned to each case. Dr. Shahawy testified that he did few entire catheterizations by himself; rather, the fellow would do various parts of the procedure and Dr. Shahawy would be available to step in if complications arose. Dr. Shahawy performed these duties until his resignation from the cardiac catheterization lab on January 25, 1974. He remained at the University of Florida Medical School as an assistant professor and director of the heart station until late December, 1985, when he moved to Sarasota, Florida.

From July, 1973 to January, 1974 when Dr. Shahawy was associated with the cardiac cath lab, Defendant Larry Elliott, M.D. was a professor of radiology and director of the division of Cardiac Radiology at the University of Florida. During the fall of 1973 Dr. Elliott was made acting medical director of the cardiac catheterization laboratory.

(2) In July, 1978 Dr. Shahawy applied for privileges to perform cardiac catheterization in the recently opened laboratory at Sarasota Memorial Hospital. His application was denied. In December, 1979, after the Sarasota County Public Hospital Board approved the formation of a Cardiac Cath Lab Standards Committee, Dr. Shahawy renewed his application for privileges. The Cardiac Cath Lab Standards Committee reviewed Dr. Shahawy's application and recommended that it be denied. From there Dr. Shahawy's application when through various hospital committees, returning eventually to the Cath Lab Standards Committee. On February 12, 1980, Dr. F. E. Rushton, Chief of Staff of Sarasota Memorial Hospital, telephoned Dr. Larry Elliott concerning Dr. Shahawy's application. As Chief of Staff, Dr. Rushton was an ex officio member of all hospital committees, and he contacted Dr. Elliott at the request of Dr. William L.

Page, chairman of the Cardiac Cath Lab Standards Committee. On February 13, 1980, in response to Dr. Rushton's request, Dr. Elliott wrote the allegedly libelous letter to Dr. Page. No evidence presented at trial suggested that Dr. Rushton's inquiry of Dr. Elliott was improper or was conducted outside the scope of a legitimate investigation of the credentials and qualifications of an applicant for cath lab privileges, nor did anything suggest that Dr. Elliott would have written the letter absent Dr. Rushton's formal request.

Although Plaintiff outlined in detail the stages at which Dr. Shahawy's application was considered by various hospital committees, that testimony is only marginally relevant to the defamation and privilege issues involved in this case. The Court finds that the hospital's review of Dr. Shahawy's application was appropriate. His application was acted upon with deliberateness and with due regard to ascertaining the reasons behind conflicting reports concerning Dr. Shahawy's qualifications to do cardiac catheterizations. Thus, when the matter came before the Sarasota County Public Hospital Board for its consideration in October, 1980, Dr. Elliott's attendance there was not extraordinary; rather, he testified at Dr. Rushton's request as part of an ongoing and properly conducted review of Dr. Shahawy's fitness to perform cardiac catheterizations in the Sarasota Memorial Hospital Cardiac Catheterization Laboratory.

(3) Defendant presented much evidence concerning the reasons for Dr. Elliott's adverse opinion of Dr. Shahawy's ability to perform cardiac catheterizations. Dr. Elliott did not closely observe Dr. Shahawy's performance in the cardiac cath lab at Shands Teaching Hospital until January of 1974. Dr. Gary Cooper, the second year fellow in the cardiac catheterization laboratory, went on vacation for two weeks beginning January 14, 1974. At the same time, Dr. David Chinoy, a first year fellow in cardiology, had just begun his training in the cath lab. Under these circumstances, Dr. Sha-

hawy was obliged to actually perform much of the catheterization procedure himself rather than merely supervising the fellow's work.

It was during this period while Dr. Cooper was on vacation that Dr. Elliott received complaints about Dr. Shahawy's work in the cath lab. These complaints prompted him to observe Dr. Shahawy perform several catheterizations on January 15 and 16, 1974. Dr. Elliott, from his observations of Dr. Shahawy, concluded that Dr. Shahawy was deficient in three areas: in his command of technical skills required for catheterizations, in creating the proper environment for the patient's psychological well being, and as a role model for the student physicians and technicians. He reached these conclusions from observing, among other things, that Dr. Shahawy neglected to clear air from the catheter prior to insertion and that a technician had to remind him to do so, that he mishandled a guide wire by jerking it from the patient while it was still in the needle, that he failed to check out the equipment before doing the procedure, that he did not listen or react quickly when the technician would warn him that the patient's heart was undergoing premature ventricular contractions, and that he created a messy environment by ejecting fluid and blood from syringes onto the floor instead of into the wash basins provided. Furthermore, Dr. Elliott felt that Dr. Shahawy's shouting and disregard for proper medical etiquette created a chaotic atmosphere in the cath lab, which could have harmful psychological effects on patients who, without anesthesia, were undergoing a somewhat anxiety-producing experience. Finally, Dr. Elliott felt that Dr. Shahawy's conduct was substandard and inappropriate as a role model for other physicians and technicians. For these reasons, Dr. Elliott notified Dr. Singleton, the acting Chief of Staff, of what he felt were the deficiencies in Dr. Shahawy's peroformance. Dr. Shahawy submitted his resignation from the cath lab on January 25, 1974.

(4) Dr. Shahawy flatly denied the occurrence of certain incidents that caused Dr. Elliott to conclude that Dr. Shahawy's conduct was substandard. However, most of these incidents were corroborated by at least one credible witness. For instance, Dr. David Chinoy, a highly credible witness, testified that although Dr. Shahawy squirted him in the eyes with heparinized solution perhaps inadvertently, he expressed no concern at Dr. Chinoy's distress or the fact that Dr. Chinoy had to seek treatment from an opthalmologist. Ms. Janet Frierson, a cardiovascular technologist who supervised the Shands cath lab during Dr. Shahawy's tenure, testified that she had to remind Dr. Shahawy to clear the air bubble from the pressure injector before injecting the contrast dye. Mr. Charles Cooper, a bioelectronic engineer at the Shands cath lab, testified that he was present when Dr. Chinoy was squirted in the eyes with the heparinized solution and that Dr. Shahawy was oblivious to the ensuing confusion. Mr. Cooper also observed Dr. Shahawy whipping the guide wire out of the patient and was concerned with Dr. Shahawy's failure to take not of changes in electrocardiograms. Dr. Michael Kelley testified that Dr. Shahawy's demeanor was not what it should be and that Dr. Shahawy was not competent to perform cardiac catheterizations in 1974 or in 1980. Dr. Gary Cooper testified that Dr. Shahawy would reattach catheters without purging air bubbles, that he jerked guide wires from patients, and that he was not competent to do catheterizations in 1974 or 1980.

Dr. Shahawy presented witnesses who testified that he was competent in catheterizations in 1974 and that he was an adequate supervisor. These witnesses included Dr. Rupert Charles Curry, a second year fellow in 1973 and 1974, and Dr. William Jape Taylor, Distinguished Service Professor of Medicine at the University of Florida who had recruited Dr. Shahawy to come to Shands in 1973. Dr. Taylor, after hearing complaints about Dr. Shahawy form Dr. Elliott and at least

one other person who worked in the lab, Dr. Gary Cooper, responded by reviewing the patients more carefully and found that technically the catheterizations were proceeding smoothly, without complications. Dr. Curry testified that Dr. Shahawy was well qualified to do cardiac catheterizations and that he had been a good supervisor while he was training. However, Dr. Taylor did not testify as to any personal observations of the Plaintiff in the performance of catheterizations.

Much testimony was devoted to Dr. Elliott's statement that Dr. Shahawy's procedures were unduly drawn out and thereby subjected patients to unnecessarily prolonged radiation. Drs. Kelley, Cooper, Curry, and Taylor were all asked what the "standard" fluoroscopy time (or exposure to radiation) should be. No clear standard emerged from this testimony. Dr. Taylor emphasized that fluorotimes would be longer in a teaching institution where the fellows were learning to perform the procedures, but this did not account for what were urged to be lengthly fluorotimes when Plaintiff did the procedures himself. Also important was the patient's condition, which would affect the amount of time it took to accomplish the catheterization.

Dr. Elliott had stated that Dr. Shahawy had done no catheterizations since Dr. Shahawy had left Shands. Dr. Shahawy has, however, performed many right heart catheterizations since that time. One can reasonably assume however, that Dr. Elliott referred to left heart catheterizations, which must be done in a cath lab. Dr. Shahawy had no opportunity during that six year period to perform left heart catheterizations except for two days in March, 1980, when he went to Indianapolis for some refresher training.

Finally, Dr. Elliott had stated that Dr. Shahawy had done no catheterizations at Shands until his student, Dr. Gary Cooper, went on vacation. Dr. Shahawy did not deny this and testified repeatedly that his role was to supervise and to step in only when the fellow needed assistance.

In fact, there was introduced into evidence only one record of a catheterization that Dr. Shahawy performed without a fellow.

The Court has outlined this testimony in some detail to demonstrate the divergent opinions of Dr. Shahawy's ability to perform competently in the cardiac catheterization laboratory. The credible evidence corroborating Dr. Elliott's statements serves in particular to show that some substantial basis existed for Dr. Elliott's performing the opinions he expressed concerning Dr. Shahawy and that he was not motivated to make the allegedly defamatory statements solely from ill will or injurious intent.

(5) Plaintiff attempted to prove that much ill will existed between Dr. Elliott and Dr. Shahawy and that Dr. Elliott's injurious comments were made maliciously and with the intent to injure Dr. Shahawy. Dr. Elliott testified that he felt it his moral and ethical obligation to insure that Dr. Shahawy would not obtain privileges to do catheterizations he was not competent to perform. Dr. Elliott asserted that all of the statements he made were accurate and true expressions of his opinion of the Plaintiff's competence based on complaints and his own observations of Plaintiff's performance. The Court finds that Plaintiff did not prove, even inferentially, that Dr. Elliott was motivated by ill will or malice in writing the February 13, 1980 letter to Dr. Page or in testifying at the meeting of the Sarasota County Public Hospital Board in October, 1980, nor did Dr. Elliott make any statements concerning Dr. Shahawy with deliberate disregard for the truth as Plaintiff claimed.

Based on the foregoing findings of fact the Court makes the following conclusions of law:

The Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1332.

Defendant Elliott's remarks in his letter to Dr. Page and in his testimony before the Sarasota County Public Hospital Board were qualifiedly privileged. A communication made in good faith on any subject matter by one having an interest

therein or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty even though it contains matters which would otherwise be actionable and though the duty is not a legal one but only a moral or social obligation. *Belcher v. Schilling*, 349 So.2d 185, 186 (Fla. 3rd DCA 1977). If the qualified privilege is founded on business matters, the statements that would otherwise be libel or slander must be made regarding the business, only to others having an interest in the business. *Axlerod v. Califano*, 357 So.2d 1048, 1051 (Fla. 1st DCA 1977). Essential elements of a conditionally privileged publication are: "(1) Good faith; (2) an interest to be upheld; (3) a statement limited in its scope to this purpose; (4) a proper occasion; and (5) publication in a proper manner." 357 So.2d at 1051. Dr. Elliott's publications clearly contained these essential elements.

The Court finds that Defendant Elliott, who had genuine reasons to doubt Dr. Shahawy's competence, made the allegedly defamatory statements in good faith; that as a physician knowledgeable in the cardiac catheterization field, Dr. Elliott had an interest in insuring that high standards were maintained in cardiac catheterization laboratories; that Dr. Elliott's remarks solely concerned cardiac catheterization standards and his professional opinion of Dr. Shahawy's competence; that Dr. Elliott's remarks were made in response to properly conducted investigations of Dr. Shahawy's application and that Dr. Elliott had no reason to believe that they would be used for any other purpose; and that writing the statements in the letter to Dr. Page and testifying before the Sarasota Public Hospital Board were proper means of communicating his opinions about Dr. Shahawy.

Because Dr. Elliott's remarks were protected by a qualified privilege, Plaintiff was required to prove that Dr. Elliott abused that privilege by acting with actual malice. When a qualified privilege exists, malice cannot be presumed as it might otherwise be in case such as this where the remarks are

claimed to have injured Plaintiff in the conduct of his profession. 357 So.2d at 1050. The Court finds that Defendant did not act with actual malice in publishing his comments about Dr. Shahawy. The Plaintiff failed to prove, even by inference, that Dr. Elliott made any false statements about Dr. Shahawy knowing of their falsity, or with reckless disregard for the truth, or with ill will or intent to injure the Plaintiff. For these reasons, Plaintiff's claims of libel, slander, and negligent defamation must fail.

Finally, Plaintiff failed completely to prove his claim of intentional interference with business relationship. Plaintiff claimed that Dr. Elliott's remarks deprived Plaintiff of his right to gain cardiac catheterization privileges and thus restricted his employment or livelihood. Plaintiff did not demonstrate that he had a legal right to an advantageous business relationship with which Defendant interfered, for nothing suggested that Plaintiff had any right to perform cardiac catheterization at Sarasota Memorial Hospital. Furthermore, no evidence of damages was presented.

Judgment will be entered in accordance with this Opinion.

DATED at Tampa, Florida this 22nd day of December, 1982.

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D.,
Plaintiff,
vs. Case No. 81-545-Civ-T-WC
LARRY P. ELLIOTT, M.D.,
Defendant.

FINAL JUDGMENT

In accordance with the Opinion filed this date, it is ADJUDGED:

As to the claims of Plaintiff Mahfouz El Shahawy, M.D. against Defendant Larry P. Elliott, M.D., Judgment is entered in favor of Defendant Larry P. Elliott, M.D. and Plaintiff Mahfouz El Shahawy, M.D. shall take nothing by this action.

DONE AND ORDERED at Tampa, Florida this 22nd day of December, 1982.

/S/
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

(3)

No. 85-318

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

October Term 1984

Mahfouz El Shahawy, M.D.,
Petitioner

v

Larry P. Elliott, M.D.

On sworn Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Eleventh Circuit in Case No. 84-3618, 83-3154 (District Court Case No. 31-545 Civ TWC)

PETITIONERS REPLY AND SUPPLEMENTARY BRIEF

MAHFOUZ EL SHAHAWY, M.D.
1851 Arlington Street
Suite 206
Sarasota, Florida 33579
(813) 366-9800
Petitioner Pro Se

QUESTIONS PRESENTED

I

WHETHER ALL QUESTIONS ONE THROUGH SIX PRESENTED BY PETITIONER IN HIS INITIAL BRIEF AUGUST 16, 1985 IS SUPPORTED BY THE RECORD CONTRARY TO THE MISLEADING BRIEF IN OPPOSITION BY THE RESPONDENT.

II

WHETHER ADDITIONAL NEWLY DISCOVERED EVIDENCE BY AN ADMISSION ON SEPTEMBER 3, 1985 BY DR. GARY COOPER, EXPERT AND STAR WITNESS FOR THE DEFENDANT DR. ELLIOTT AT THE TRIAL LEVEL, AND DEFENDANT IN A CLOSELY RELATED CASE, IS A BADGE OF FRAUD SUFFICIENT TO WARRANT REMAND FOR INVESTIGATION FOR FRAUD ON THE COURT. DR. COOPER WAS A DEFENDANT IN A CLOSELY RELATED CASE.

III

WHETHER THE PER CURRIAM AFFIRMANCE OF THE ELEVENTH CIRCUIT ERRONEOUSLY DECIDED THE ISSUE BEFORE IT OF WHETHER THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA IN AFFIRMING THE CLERK'S TAXATION OF A BILL OF COSTS AGAINST SHAHAWY HAD ANY DISCRETION TO AFFIRM THE BILL OF COSTS WHERE THE RESPONDENT ELLIOTT HAS INCURRED NO LIABILITY FOR COSTS.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	0-0
TABLE OF CITATIONS	i
PETITIONER'S REPLY AND SUPPLEMANTARY BRIEF	1-22
STATEMENT OF THE CASE	1-8
NEWLY DISCOVERED EVIDENCE	8-12
ARGUEMENT-REASONS FOR GRANTING WRIT	12-20
CONCLUSSION	21-22
CERTIFICATE OF SERVICE	23
APPENDIX A: District Court order August 3, 1984.	24-25
APPENDIX B: Notice of Appeal, August 3, 1984.	26
APPENDIX C: Motion to Court of Appeals, January 11, 1985.	27-28
APPENDIX D: Motion to Stay Issuance of Mandate, May 24, 1985	28-30
APPENDIX E: Letter of apology of Dr. Gary Cooper, expert witness for defendant, September 3, 1985	31
APPENDIX F: Minutes of Executive Committee of Sarasota Memorial Hospital, August 19, 1985	32

TABLE OF CONTENTS, CONTINUED

PAGE

APPENDIX G: Minutes of Special Board meeting of Sarasota County Public Hospital Board, August 19, 1985 33

APPENDIX H: Quotation from Sarasota County Public Hospital Board Meeting on October 22, 1980, regarding: Dr.'s Elliott and Cooper's credibility 34-35

TABLE OF CITATIONS

CASES	PAGE
Armour and Co. v Nard D.C. Iowa 1972 56 F.R.D. 610	16
Dankese Engineering Inc. v Ionics Inc. D.C. Mass. 1981, 89 F.R.D. 154	14
Dasher v Mutual Life Insurance Company of New York 78 F.R.D. 142 145, S.O. Ga. 1978	6,16
Egan v City of Aurora et al 365 U.S. 514, 5 L.Ed 2d 741, 81 Supreme Court 684	18,19
Honneus v Donovan D.C. Mass. 1982 93 F.R.D. 433	14
Jenkins v State 385 SO 2d 1356 (Fla. 1980)	17
Kuperman v Consolidated Research nd Mfg. Corp. D.C. N.Y. 1971, 53 F.R.D. 387, affirmed 459 F2d 1072	15
Peacock Records, Inc. v Checker Records, Inc. C.A. Ill. 1966, 365 F.2d 145 certiorari denied 87 S.CT 707, 385 u.S. 1003, 17 L.Ed 2d 542	14
Porcelli v Joseph Schlitz Brewing Co. D.C. Wis. 1978, 78 F.R.D. 499, affirmed 588 F.2d 838	15,16
Williams v Board of Regents of University System of Georgia D.C. GA. 1981, 90 F.R.D. 140	15

PETITIONER'S REPLY AND AND SUPPLEMENTARY BRIEF

STATEMENT OF THE CASE

Petitioner has stated the case clearly, in his initial brief to the court, petitioner initial brief pages 3-12.

Respondent's brief in opposition attempts to limit the court to only one issue, ie bill of costs. This is not correct since petitioner took his appeal to the 11th Circuit from final judgement of the District Court on August 3, 1984 where the petitioner was denied all the issues he stated in this certiorari petition to the United States Supreme Court, (App. A-D).* This is in contrast to the defendant's counsel's statement in respondents brief page 1, which is incorrect and misleading. Also the order presented in the respondent's app. p. 3 was not the basis for the appeal. This was entered June 12, 1984 prior to the plaintiff's

*Original lodged with the Clerk.

notice of appeal on August 3, 1984 from the order entered on 8/3/84, petitioner App. A . So defendant's counsel's representation to this Court definately was incorrect. Dr. Shahawy does not seek review of an unpublished per curriam affirmation as stated by respondent.

The genesis of the petition to the United States Supreme Court was based on the fact that Dr. Shahawy discovered perjury and fraud on the Court as he reviewed the bill of costs as outlined in his initial brief. This could even be seen clearly on the bill of costs which the respondent's counsel used in his appendix to this Court on pages 4, 4A, 4B, 4C, 4D, and 4E. On these six pages which were supposed to represent the bill of costs, it is clearly evident that <u>there was perjury</u> on the part of the defendant's attorney Mr. Strelec when he signed the bill stating that

the initial amount he asked for, $13,296.75, was incurred on that case by Dr. Elliott. The Clerk of the Court without even all of the detailed knowledge surrounding this case and other related cases, immediately discovered 50% of these charges were not even justified and the bill was cut down to $6,062.85 as can be seen in respondent's App. 4-4E.

Respondent's counsel has asked for and has already paid Dr. Chinoy, who is a non-expert witness, $4625.00 for less than one hour of testimony before the trial court. This outrageous payment was easily picked up by the Clerk of the Court who cut it down to $230.00 as can be seen in the respondent's appendix, (resp. App. 4B). Dr. Chinoy traveled only from Jacksonville Florida to Tampa Florida, which are less than 150 miles apart. Additional witness fees were also paid by the respondent's

counsel to Dr. Chinoy. An item of $300.00 was cut by the Clerk of the Court to $30.00 as can be seen, (Resp. App. 4D). Dr. Chinoy's testimony was definitely not supported by the facts as will be discussed later and as a matter of fact can be construed as perjury and fraud on the Court. Why was Dr. Chinoy paid nearly $5,000.00 for less than one hour of testimony before the court? Was that an incentive for Dr. Chinoy to come and give false testimony before the Court? If the trial judge knew of this, would he consider Dr. Chinoy a credible witness or a paid witness? Furthermore, respondent's appendix page 4C and 4D shows the names of witnesses who have been paid travel expenses who have neither traveled to Tampa nor given testimonies as Mr. W. Hereford,* (Resp. App. P. 4D). Is this not a fraudulent bill of costs? Furthermore, on the same bill of costs the

*And C. Williams and J. Floyd.

respondent's counsel asked for deposition fees for Mrs. Kathy Tyrity in the amount of $202.95 which was asserted as counter claim which was dismissed by the Court and which was never used at the trial; was this justified? Additional details about the inappropriatness of the bill of costs are detailed in the petitioner's initial brief, pages 9-12.

Furthermore, petitioner would like to call to the Court's attention that expense of that deposition and other claimed expenses were incurred not only on the case of Dr. Elliott, but also on related cases in the Federal and State Courts as stated on the petitioner's initial brief, (Shahawy v Cooper Case No. 31-1808 C.A. Alachua County Florida and Shahawy v Harrison et al Case No. 83-3154 11th Circuit, Atlanta Georgia).

The respondent's counsel was fully aware that his client Dr. Elliott did

not pay a penny of the bill of costs. Furthermore, he is also fully aware the payment was made by an insurance company and officials of Sarasota Memorial Hospital, who are currently defendant's in a related case before the Federal Court, as cited above. The insurance company which paid part of Dr. Elliotts costs of legal defense has been reorganized but as that time was under the name of Pimco, and did not insure Dr. Elliott, but did insure other physicians and defendants in the related case cited above. Respondent's counsel's response, (Resp. Brief p. 8), on this matter was misleading. Dr. Elliott was not insured by this insurance company which picked up part of his expenses. This case is distinguished from the case respondent cited, (Resp. Brief p. 8), Dasher v Mutual Life Insurance Company of New York, 78 F.R.D. 142, 145, S.D. Ga. 1978. In

that case the defendant was the insurance company who paid the legitimate travel expense of a witness. See petitioner's petition pages 9-12 for statement of illegal maintenance of Dr. Elliott's defense by the Hospital Board and Pimco Insurance Company. Dr. Elliott incurred no liability for costs. Also, it is very interesting to note the respondent's counsel did not challenge petitioner on the fact that the bill of costs was paid mostly by Sarasota County Hospital Board officials, members of which are currently defendants in the related case, petitioner's initial brief pages 10-12.

From the foregoing it is clearly evident that the respondent's brief is incorrect on this matter and not supported by the record. Dr. Elliott did not incur any of the expenses. Payments were approved unlawfully by officials of Sarasota Memorial Hospital, and the

insurance company PIMCO, which was not insuring Dr. Elliott, but other defendants in still pending related cases.

NEWLY DISCOVERED EVIDENCE

Newly discovered evidence supports petitoner's request to the Supreme Court as clearly outlined in his inial brief. The newly discovered evidence best illustrated by the recent admission of Dr. Gary Cooper who was the only Board certified cardiologist with training in cardiac catheterization, who testified on behalf of Dr. Elliott before the trial court. Dr. Cooper's perjured testimony on behalf of Dr. Elliott was most damaging to Dr. Shahway at the time of trial and petitioner has always maintained the position that this testimony was a fraud on the Court and that was the reason petitioner requested the trial court to withhold any final judgment until related litigations had been completed.

This request was denied by the trial judge as noted in his order of August 3, 1984, petitioner's appendix B. As a matter of fact Dr. Cooper's testimony appeared to have had a great weight on the opinion entered by the Court in it's ruling on December 22, 1982, as can be seen in respondent's appendix page 6C, 6E. An important related litigation to which the petitioner referred was the suit against Dr. Gary Cooper filed in Allachua County florida Case No. 81-1308-CA-01. This case was supposed to go on trial before a jury on September 3, 1985. On that date Dr. Gary Cooper, who was a star witness for Dr. Elliott, finally admitted under oath by notorized statement, that his testimony was based on heresay and offered an apology to the petitioner together with an undisclosed amount of money. Defendant and expert witness Dr. G. Cooper stated in his witnessed

and notarized letter of apology of September 3, 1985 the following:

> "After you filed suit against me, my lawyer and I investigated the circumstances and determined that the events which were the subject of the rumor did not actually happen and that in fact the rumor was not true. Furthermore, we reviewed all the cardiac catheterization cases in which you participated including those cases which I performed under your supervision, and found they did not reveal the occurrence of any mishaps or complications.
>
> I apologize to you for having repeated the false rumor without having first conducted an investigation to verify whether or not it was true. I had expected that Sarasota Memorial Hospital would conduct an appropriate investigation. I regret anyone taking as fact my repetition of the rumor. I retract the statements which I made regarding the rumor and ask that if any judgment or decison concerning you made by Sarasota Memorial Hospital was based on my statements, the appropriate parties should reconsider their judgment and decision. I would certainly agree with you that such important judgments or decisions should not be made on the basis of a rumor." (Petioner's App. E, original lodged with the Clerk).

Interestingly enough the officials of Sarasota Memorial Executive Committee and Board, who are defendants in the case cited above, were not only paying the defense of Dr. Cooper, but even wanted to appear before the Court in his support as noted by the Executive Committee of August 19, 1985, (Pet. App. F., original lodged with the Clerk):

> "The Dr. Shahawy defamation suit against Dr. Cooper was discussed. Motion was made to request the hospital Board to intervene on behalf of Dr. Cooper".

And a special Hospital Board meeting on August 26, 1985:

> "Mr. Lamar Mathews* then reviewed the status of the Shahawy vs. Cooper case. Discussion followed with Dr. Stutz *reporting that the medical staff Executive Committee unanimously passed a resolution recomending to the board to take the act recommended by counsel."(Pet. App. G, original lodged with the Clerk) *Defendants in related case.

Sarasota Memorial Hospital officials wanted to see that Dr. Cooper

also succeed at the lower court level as they did with Dr. Elliott inspite of the obvious injustice done to the petitioner. Dr. Cooper however in spite of their help and finacial support admitted that he testified falsely, as depicted by his letter quoted above. These facts are well known to the respondent's counsel. Dr. Elliott, who is a radiologist and not a cardiologist repeatedly stated before the trial courts in his testimony that most of his knowledge was coming from Dr. Cooper, and it is not fair and honest that his testimony be accorded credence. Now from this newly discovered evidence and admission of Dr. Cooper there should be no doubt that there has been a fraud practiced on the trial court.

ARGUMENT

REASONS FOR GRANTING WRIT

For the reasons cited above

petitioner requests the Court to grant his petition. Dr. Shahawy does not here attempt to review those issues as such in Case No. 84-3618. Dr. Shahawy requested the Court to re-examine awarding the bill of costsfor $6,062.85 to Dr. Elliott, and requested the Court to stay the court proceeding pending decisiion in related suits and the investigation for fraud. It is clear from the aforestated facts that Dr. Shahawy's request was justified. There is no time limit which prevents setting aside any judgment for fraud on the Court. New matter not available at the time Dr. Shahawy filed his petition has been discussed above, via Dr. Cooper's letter.

The admission of defendant's star witness Dr. Gary Cooper on the day of his supposed trial before the jury warrants that this Court in exercise of it's supervisory power over inferior

Federal Courts remand Case No. 83-3514 for ultimate disposition to the trial court of the sericus issue of fraud on the Court raised by the new matter cited above. Any court at any time may set aside the judgment for fraud on the court, usually egregious conduct involving corruption of the judicial process it's self. Honneus v Donovan D.C. Mass 1982, 93 F.R.D. 433. Fraud upon the Court is a special kind of fraud, Dankese Engineering, Inc. v Ionics, Inc. D.C. Mass. 1981, 39 F.R.D. 154.

Refusal to vacate judgement by District Court on motion which asserted that judgment had been obtained by fraudulent testimony that been procurred was not sound legal discretion. Peacock Records, Inc. v Checker Records Inc. C.A. Ill. 1966, 365 F.2d 145. certiorari denied 87 S.Ct. 707, 385 U.S. 1003, 17 L.Ed 2d 542. The illegal maintenance by the Hospital Board and

Pimco of Dr. Elliott's defense which induced his false testimony as expounded in petitioner's petition, and because such inducement of false testimony obstructs the judicial process itself it is grounds for finding fraud on the Court. Courts may at any time set aside judgments for fraud upon the court; "fraud upon the court" such as may warrant relief from judgment embraces only that species of fraud which does, or attempt to defile the Court itself, or is fraud perptuated by officers of court so that the judicial machinery cannot perform in the usual manner in its impartial task of judging cases. Kuperman v Consolidated Research and Mfg. Corp., D.C. N.Y. 1971, 53 F.R.D. 387, affirmed 459 F.2d 1072. See also, Williams v. board of regents of University System of Georgia, D.C. Ga. 1983, 90 F.R.D. 140; Porcelli v Joeseph Schlitz Brewing Co., D.C. Wis.

1978, 78 F.R.D. 499, affirmed 588 F.2d 838; Armour and Co. v Nard, D.C. Iowa 1972 56 F.R.D. G10.

As to the award of costs, Dr. Shahawy's contention is that Dr. Elliott incurred no liability for costs and any use of the word "over reimbursment" did not imply that Dr. Elliott was entiteled to a quantum of reimbursment but intended to convey the meaning that Dr. Elliott was entiteled to no cost, to nothing. The case Dasher v Mutual Life Insurance Co. of N.Y., 78 F.R.D. 142, 145 (S.D. Ga. 1978) was presented as holding the fact the insurance carrier picked up the expense tab did not preclude an award of costs in the prevailing party's behalf. That presentation is misleading, because it did not make clear that the insurance carrier was both party defendant and the prevailing party, and paid the legitimate travel expenses of a witness

and is distinguished from this case therefore. In this instant case, the Sarasota Memorial Hospital Board and Pimco Insurance Company are not parties to this action and induced Dr. Elliott's false testimony by illegally maintaining his defense by paying his legal defense as has been discussed in the initial petition to this Court. Dr. Cooper has now admitted under oath that he testified falsely. Because Dr. Elliott incurred no liability for legal expenses and cost the Court had no discretion to award him cost as discussed in petitioner's initial petition.

Respondent cites Jenkins v State 385 So2d 1356 (Fla. 1980), as precedent that a per curriam affirmation without opinion does not create any conflict with decisions of other circuits because there is no written opinion to generate conflict. Prior to April 1, 1980 a per curriam decision without any

opinion was held subject to review in Florida by certiorari where a conflict is established by the record proper. As of April 1, 1980 the Supreme Court of Florida lacks conflict jurisdiction to review per curriam decisions of the several District Courts of Appeal rendered without opinion where express and direct conflict is lacking. Jenkins Supra. By way of illustration a contrario, the United States Supreme Court will infer conflict of a Court of Appeal with its own view where the opinion of the court of appeals is not explicit in its grounds for judgment which are vague Egan v City of Aurora et al 865 U.S. 514, 5 L Ed. 2d 741, 81 Supreme Court 684.

The Court of Appeal's affirmance per curriam without opinion of the District Court's judgment, also ratified and adopted that judgment. A simple inspection of the record proper, will establish the conflict set forth in

petitioner's petition, a simple task much less burdsome than this Court performed in inferring conflict from a non-explicit, vague opinion in Egan v City of Aurora Supra. Conflict is the single most important reason this Court weighs in exercising its discretion to grant certiorari because of the tendency of judge-made law to become confused by conflict.

Allowing Dr. Elliott to profit from his false testimony by sustaining an award to him of costs for which he never incurred liability is not only a grave departure from established law, but also contrary to equitable principles out of which the Federal law governing granting of costs grew in that this wrongdoer is therby enabled to profit from his wrong doing.

In this case it is clearly evident that paying Dr. Elliott's legal expenses was illegal maintenance as tending

to subvert justice by inducing perjury as alleged in petitioner's petition. Aside from the issue of maintenance, the insurance company Pimco had no business paying Dr. Elliott's legal defense where he was not insured by the company. the Sarasota County Hospital Board found at it's hearing on October 22, 1980 that Dr. Elliott along with Dr. Cooper, (Pet. App. H*), were not believalbe, so they had no business to pay Dr. Elliott's defense. Remarks which were made by this Hospital Board at that time about Dr. Elliott's credibility is discussed in the petitioner's initial petition on pg. 6-8.* The support which was given to Dr. Elliott, unlawfully, was clearly for a personal vendetta. Because petitioner has initiated a legal action against the offical wrongdoing on the related matter.

*Also in petitioner's App. H, original lodged with the clerk.

CONCLUSION

Respondent's brief in opposition was not only crafted to confuse the issues before the court, but also was unresponsive to nearly all of the related issues raised by the petitioner in his initial petition. The record is replete with facts to support all the questions raised by petitioner in his initial brief, and now is supported by the admission of the defendant's expert witness that he testified falsely.

The coupling of Dr. Cooper's admission under oath of his false tesimony with the illegal maintenance of both Dr. Cooper's and Dr. Elliott's defense is a sufficient badge of fraud to warrant further investigation by the Court and this Court may wish to remand this case for investigation of fraud on the court.

wherefore petitioner respectfully prays this Honorable Court to correct

the above mentioned grave departures from the course of judicial conduct. There has been here "a pollution" of the judicial process. This is of sufficient public importance to warrent setting aside the judgment, and this Court may wish to remand this case for investigation of fraud on the Court. For the above reasons petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

M. El Shahawy M.D.

MAHFOUZ EL SHAHAWY, M.D.
Petitioner pro se
1851 Arlington St. Suite 206
(813) 366-9800

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCRIBED TO ME THIS 30th DAY OF OCTOBER 1985, AND BEFORE ME PERSONALLY APPEARED MAHFOUZ EL SHAHAWY, M.D. TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC Beryl E Adams

My Commission Expires: 2/13/86

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this petition was furnished by mail to defendant Dr. Larry Elliott and his counsel Mr. G. Hunter Gibbons Esq. and Clare L. Hamner Esq. P.O. Box 3979 Sarsota, Florida 33578; Charles Johnson M.D., Chairman Sarasota County Public Hospital Board, Sarasota Memorial Hospital, 1700 S. Tamiami Trail, Sarasota, Florida 33579; Department of Justice, Washington D.C.; and Mr. Philip Beauchamp, Administrator, Sarasota Memorial Hospital, 1700 S. Tamiami Trail, Sarasota, Florida 33579, this 30th day of October 1985.

M. El Shahawy, M.D.

M. EL SHAHAWY, M.D., Petitioner pro se
1851 Arlington Street, Suite 206
Sarasota, Florida 33579
(813) 366-9800

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCRIBED TO ME THIS 30TH DAY OF OCTOBER 1985, AND BEFORE ME PERSONALLY APPEARED MAHFOUZ EL SHAHAWY, M.D., TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC Beryl E Adams

My Commission Expires: 2/13/86

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D.,

Plaintiff,

vs. Case No. 81-545-Civ-T-

LARRY P. ELLIOTT, M.D.,

Defendant.

O R D E R

The Court has for consideration several motions filed by Plaintiff. Upon review, it is

ORDERED:

1. Plaintiff's Motion for Relief from Clerk's Taxation of Costs and Court's Order of June 12, 1984 is denied.

2. Plaintiff's Motion to Review Clerk's Taxation of Costs is denied.

3. The motion of the law firm of Bailey & Dawes, P.A., to withdraw as counsel for Plaintiff is granted, and the law firm of Bailey & Dawes, P.A. is relieved of further responsibility in this action.

4. Plaintiff's Motion to Strike Defendant's Memorandum is denied.

APPENDIX A (cont'd)

5. Plaintiff's Request that the Court stay any further ruling in this matter until related litigations have been resolved is denied.

DONE AND ORDERED at Tampa, Florida this 3rd day of August, 1984.

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAHFOUZ EL SHAHAWY, M.D.,
Plaintiff,

VS.

Case No. 81-545-Civ-T-WC

LARRY P. ELLIOTT, M.D.,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that Mahfouz El Shahawy M.D., plaintiff above named, hereby appeals to the United States Court of Appeals for the 11th Circuit (from the final judgment) (from the order (describing it)) entered in this action on the 3rd day of August, 1984.

Mahfouz El Shahawy M.D.,
Plaintiff
1851 Arlington Street
Suite 206
Sarasota, Fla. 33579

August 31, 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
11TH CIRCUIT OFFICE OF THE CLERK
56 FORSYTH STREET N. W.
ATLANTA, GEORGIA 30303

MAHFOUZ EL SHAHAWY, M.D.,
etc., et al.,

Plaintiffs/Appellants

vs

CASE NO. 84-3618

LARRY P. ELLIOTT, M.D.,

Defendant/Appellee

/

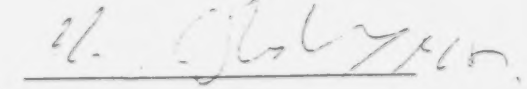
MOTION TO VACATE CLERK'S TAXATION OF COSTS OF JUNE 1984 AND TO REMAND THE CASE TO THE DISTRICT COURT FOR A NEW TRIAL, BY JURY, BASED ON NEWLY DISCOVERED EVIDENCE OF FRAUD AND CONSPIRACY, OR, ALTERNATIVELY, TO STAY THE CASE HEREIN, PENDING COMPLETION OF INVESTIGATION BY FEDERAL BUREAU OF INVESTIGATION AND OF RELATED LITIGATIONS IN FEDERAL AND STATE COURTS

The Plaintiff/Appellant submits to the Court that he himself, in preparing the APPELLANT'S BRIEF which is enclosed herewith discovered evidence of fraud and conspiracy. This fraud involves abuse of use of public funds of Sarasota County which are allocated primarily for public health care. There is also evidence of possible conspiracy among Defendant Dr. Larry Elliott, officials of the Sarasota County Public Health Board, and possible third or fourth party or parties.

Accordingly, Plaintiff prays the Honorable Court vacate the District Court Clerk's taxation of costs of June 1984 and remand the whole case to the District Court for a new trial before a jury, based on the most recently discovered evidence of fraud and possible conspiracy.

Alternatively, the Plaintiff requests a stay in this case until ongoing investigations by the Federal Bureau of Investigation and state and local authorities, and related litigations, have been completed.

M. EL SHAHAWY, M.D., F.A.C.C., P.A.



1851 Arlington Street
Sarasota, Florida 33579
(813) 366-9800

Plaintiff/Appellant

APPENDIX C (con't)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been served by mail on each of the following, this 11th day of January, 1985:

Frank E. Strelec, Esquire
and Clare L. Hamner, Esquire
Post Office Box 3979
Sarasota, Florida 33578

Chairman, Sarasota County Hospital Board
Sarasota Memorial Hospital
1901 Arlington Street
Sarasota, Florida 33579

Administrator, Sarasota Memorial Hospital
1901 Arlington Street
Sarasota, Florida 33579

Federal Bureau of Investigation

Department of Justice
Washington, D. C.

Chairman, Committee of Ethics
State of Florida
Post Office Box 6
Tallahassee, Florida 32302

Frank Schaub, Esquire
State Attorney
2002 Ringling Boulevard
Sarasota, Florida 33577

Florida Department of Law Enforcement
Tallahassee, Florida

M. EL SHAHAWY, M.D., F.A.C.C., P.A.

By _____

Plaintiff/Appellant

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
11TH CIRCUIT OFFICE OF THE CLERK
56 FORSYTH STREET N. W.
ATLANTA, GEORGIA 30303

MAHFOUZ EL SHAHAWY, M.D.
ect., et al.,
Plaintiffs/Appellants

vs.

CASE NO. 84-3618
D.C. No. 81-545-CVC-T-15

LARRY P. ELLIOTT, M.D.
Defendant/Appellee

/

MOTION TO STAY ISSUANCE OF MANDATE PENDING
APPLICATION TO SUPREME COURT FOR WRIT OF CERTIORARI

Pursuant to the provisions of section 210 (f), Title 28, United States Code, and Rule 41(b) of the Federal Rules of Appellate Procedure, Mahfouz El Shahawy M.D., the above named appellant, respectfully moves the Court to enter an order staying issuance of the mandate in the above entitled appeal.

The reason for this motion is that it is the bona fide intent of the above-named appellant to make proprer and timely application to the Supreme Court of the United States for a writ of certiorari.

The petition for a writ of certiorari will be substantially based on the following grounds:

1. This Court overlooked, or misapprehended the fact that the defendant Dr. Elliott did not pay any of the bill of costs, but rather a third party, "Sarasota Memorial Hospital Board", which is currently involved in related litigations in this Court. Sarasota Memorial Public Hosptial Board abused the power of office and unlawfully paid the expenses of defendant Dr. Elliott in violation of Hospital, State and Federal laws.

2. This Court overlooked, or misapprehended the fact that defendants attorney Mr. Strelec committed perjury by signing incorrect bill of costs. Furthermore, he presented the Court with perjured testimony by numerous witnesses.

3. This Court overlooked, or misapprheneded the fact that the bill of costs submitted was not soley incurred in this case. This Court overlooked or misapprehended the fact that the District Court erred in denying plaintiff's motion to stay ruling until related litigations have been resolved.

4. The District Court erred in finding Dr. Elliott's remarks qualifiedly privileged, that Elliott's remarks were not uttered maliciously, excluding evidence for damage of Shahawy's reputation.

5. This court overlooked, or misapprehended the fact of the newly discovered evidence to support the link of a

APPENDIX D (con't)

conspiracy between defendant Dr. Larry Elliott and Sarasota County Public Hospital Board, which was directly or indirectly responsible for denial of plaintiff's privileges at Sarasota County Public Hospital Board, which is in violation of Federal Anti-Trust Laws, Civil Rights Act, The Racketeer Influenced and Corrupt Organization Act, and Florida Statutes and Common Law.

6. This Court overlooked important facts and failed to remand for a new trial before a jury based on new discoveries and fraud of Sarasota County Public Hospital funds by defendant Larry Elliott.

Wherefore, the above named appellant respectfully moves the Court for an order staying the issuance of the mandate herein pending the filing by appellant of a petition for writ of certiorari in the Supreme Court of the United States, and until final disposition therein of the above-entitled appeal.
Dated May 24, 1985

Mahfouz El Shahawy, M.D., pro se
1851 Arlington St. Suite 206
Sarasota, Fl. 33579 (813) 366-9800

Certificate

I Mahfouz El Shahawy, M.D., appellant, hereby certify that the foregoing motion to stay issuance of mandate is, and application to the Supreme Court of the United States for a writ of certiorari will be, presented in good faith. Such application will not be frivolous nor filed merely for delay.

Mahfouz El Shahawy, M.D., pro se
1851 Arlington St. Suite 206
Sarasota, Fl. 33579 (813) 366-9800

I HEREBY CERTIFY that a true copy of the above has been furnished to the following this 24 day of May 1985.

1. Frank E. Strelec and Clare L. Hamner, Esq., P.O. Box 3979, Sarasota, Fl. 33578
2. Mr. Phillip Beauchamp, Administrator, Sarasota Memorial Hospital, 1700 Tamiami Trail, Sarasota, Fl. 33579
3. Dr. Charles Johnson, Chairman, Sarasota County Public Hospital Board, Sarasota Memorial Hospital, 1700 Tamiami Trail, Sarasota, Fl. 33579

Mahfouz El shahawy, M.D.
Plaintiff

APPENDIX E

Diplomates
American Board of Internal Medicine
American Board of Cardiovascular Disease

Cardiology Associates of Gainesville

Gary R. Cooper, M.D., F.A.C.C.
Michael C. Dillon, M.D., F.A.C.C.
Burton V. Silverstein, M.D., F.A.C.C.

G. COOPER AND ASSOCIATES, P.A.

Dr. Mahfouz El Shahawy
1851 Arlington Street
Sarasota, FL 33579

RE: Shahawy v. Cooper

Dear Dr. Shahawy:

When I was contacted by Sarasota Memorial Hospital about your qualifications and the alleged events which occurred at Shands Teaching Hospital during 1973 and 1974, when I was a Fellow in training under your supervision while you were Director of the Cardiac Catheterization Laboratory, I repeated to Sarasota Memorial Hospital a rumor which I had heard. I do not recall from whom I heard the rumor. The rumor concerned alleged complications which supposedly occurred while I was away at a meeting in Colorado. As you know, I was not present when the alleged complications supposedly happened, and I do not know the complications to have actually occurred. When I repeated what I had heard, I said that it was a rumor and suggested that it be investigated. After you filed suit against me, my lawyer and I investigated the circumstances and determined that the events which were the subject of the rumor did not actually happen and that in fact the rumor was not true. Furthermore, we reviewed all the Cardiac Catheterization cases in which you participated including those cases which I performed under your supervision, and found they did not reveal the occurrence of any mishaps or complications.

I apologize to you for having repeated the false rumor without having first conducted an investigation to verify whether or not it was true. I had expected that Sarasota Memorial Hospital would conduct an appropriate investigation. I regret anyone taking as fact my repetition of the rumor. I retract the statements which I made regarding the rumor and ask that if any judgment or decision concerning you made by Sarasota Memorial Hospital was based on my statements, the appropriate parties should reconsider their judgment or decision. I would certainly agree with you that such important judgments or decisions should not be made on the basis of a rumor.

I do not, and never have, felt any malice or ill will towards you. Again, I regret if anyone took as true the information which I passed on and which has ultimately been revealed to be a false rumor.

Sincerely,

Gary R. Cooper

Dr. Gary R. Cooper

Subscribed and sworn to before me this 3rd day of September, 1985.

NOTARY PUBLIC, State of Florida at Large

Notary Public, State of Florida at Large
My Commission Expires: My commission expires April 21, 1986
Bonded thru Lawyers Surety Corp.

Phone 904-376-1612 [illegible] Gainesville, Florida 32601

APPENDIX F

Members present		Excused	Also Present
Dr. D. Stutz	Dr. H. Youngs	Dr. S. Braunstein	Dr. C. Mathews, Dir.Staff Affairs
Dr. R. Sarkis	Dr. J. Reeder	Dr. H. Kutman	Dr. E. Houck, Administratin
Dr. W. Belmont	Dr. H. Gerry		Ms. M. Walmsley, Administration
Dr. K. Gordon	Dr. P. Leichter	Absent	Dr. R. Tucker
Dr. R. Morse	Dr. C. Pflug	Dr. I. Soussou	Rebecca Vocke
Dr. M. Salem	Dr. J. Slocum	Dr. R. Weltzner	Dr. R. Windom
Dr. J. R. Spencer	Dr. J. Steele		Dr. K. Kiehl (for Dr. Fleegler)

TOPIC	DISCUSSION	ACTION
Call to Order:	The meeting was called to order at 6:35 p.m. by Chief of Staff David R. Stutz, M.D.	
Minutes:	The minutes of the meeting of July 15, 1985 were approved as distributed.	M-S-P approval.
President's Report:	The President's report was given by Vice President M. Walmsley. She reported that patient days were down slightly from this time last year. Cape Surgery Center is doing well. The Cath Lab is up and running again. The Hospital Board is having an extra meeting August 26, to discuss the ElShahawy vs. Cooper suit. Dr. Houck reported a signed joint venture between the hospital and as yet un-named parties for the OP CT project. The Hospital reviewed proposals from 6 Home Health Facilities, and are looking into acquiring Florida Home Health Services. The State recently disapproved a CON for a 100 bed osteopathic hospital. There are hearings being held currently regarding this issue. The physician need analysis has been completed by Tribrook, and there are 5 copies of the Tribrook Report available in the Medical Staff Office for review by physicians. Dr. Stutz interjected his encouragement of the Staff reading this material and writing their feelings regarding this report so that he will be able to report the Staff feelings to the Hospital Board. The Staff office will accept these comments for Dr. Stutz.	Accepted for Inform.
Legal Matters:	The Dr. Shahawy defamation suit against Dr. Cooper was discussed. Motion was made to request the Hospital Board to intervene on behalf of Dr. Cooper.	M-S-P vote of support passed unanimously.

APPENDIX G

PRESENT:	Charles A. Johnson, M.D., Chairman Mr. David Bowman Ms. Lori Brand-Stall Mr. Charles Baumann Ms. Barbara Shoaff Ms. Virginia Balk Mrs. Marian Baylis Mr. I. J. Rand Harry O. Specht, M.D.
ALSO PRESENT:	Mr. Philip K. Beauchamp, F.A.C.H.A., President W. T. Harrison, Jr., Esq., Hospital Counsel Lamar Mathews, Esq., Hospital Counsel Mr. Dale Beachey, Vice President/Finance Mr. Steven Berling, Vice President Edward W. Houck, Ph.D., Vice President/Planning and Marketing David Stutz, M.D., Chief of Staff Charles R. Mathews, M.D., Director for Medical Staff Affairs Ms. Rebecca Vocke, Assistant Director of Nursing Mr. Ernest Smith, Ernest Smith Insurance Mr. David Martin, Herald Tribune
CALL TO ORDER:	The meeting was called to order at 12:30 P.M. by the Chairman, Charles A. Johnson, M.D., who stated the purpose of the meeting was to determine whether the hospital board should intervene for a limited purpose in the case of Shahawy vs. Cooper.
COUNSEL REVIEWS SHAHAWY CASES	Mr. Harrison then gave a broad overview of the history of the Shahawy lawsuits. Mr. Lamar Mathews then reviewed the status of the Shahawy vs. Cooper case. Discussion followed with Dr. Stutz reporting that the medical staff Executive Committee unanimously passed a resolution recommending to the board to take the action recommended by counsel.
MOTION TO INTERVENE ON A LIMITED BASIS IN COOPER CASE	Ms. Brand-Stall then made a motion that the hospital board intervene in the case of Shahawy vs. Cooper for the limited purpose of asserting the confidentiality of peer review records and proceedings. Mr. Baumann seconded the motion. Discussion followed on the motion and was unanimously approved when vote was taken.
ADJOURNMENT	There being no further business to come before the meeting, it was adjourned at 12:45 P.M.

Minutes of Special Board Meeting Of Sarasota County
Public Hospital Board, August 25, 1985

APPENDIX H

QUOTATIONS FROM SARASOTA COUNTY PUBLIC HOSPITAL BOARD MEETING ON 10/22/80

Excerpts of the Sarasota County Public Hospital Board member's discussion during their deliberation at the end of the hearing on October 21, 22, 1980, as evidenced in the official court reporters transcript at the end of the hearing. Here what they said about Dr.'s Cooper, (a resident in training at U. F.), and Elliott, (a radiologist in training at U. F.); both testified against Dr. Shahawy as contrasted with the testimonies of Dr. C. Curry, (Professor of Cardiology at U. F.), and Dr. Daicoff, (Professor and Chairman of the Cardiac Surgery Program at U. F.), both of whom testified on behalf of Dr. Shahawy.

Hospital Board member Mr. Rand:

> I realize that Dr. Curry's testimony and Dr. Daicoff's testimony I was very much impressed with their professional atmosphere than I was with the other folk (page 240)

Hospital Board member Mrs. Balis:

> Dr. Curry and Dr. Daicoff- they all said he was compatent and adequate, and that's what I have to go on (page 242)

Hospital Board Member Mr. Hereford:

> I think that Dr. El Shahawy was treated very shabbily in this whole thing... (page 248)
> I thought Dr. Cooper and Elliott were beauts (page 248)
> ...They wrote letters, I think their testimony was a classic exhibition of the value of the hearsay rule. Both exhibited obvious bias against Dr. Shahawy. I think Elliott is a blow-hard, political type of college faculty member, he was Shahawy's rival.... He was Shahawy's rival at the University

of Florida. He rose from the ranks stepping on his head, if that be the case. He had personal --he utilized whatever he did for personal gain as far as I'm concerned. And I think Cooper was an insidious smart alleck, and he had personal gain because he got the status of replacing Dr. Shahawy as the head of the Adult Catheterization while he was still a fellow in training. So he got some personal gain there, and I bet you he's exploited that from there on. I don't think either one of them are credible witnesses. I think their testimony was impeached very nicely tonight by a couple of witnesses that showed a great deal of credibility. (page 249)

Hospital Board Member Baylis:

I think personalies are in it more than qualifications. That's the thing that botners me the most ---I know you try and separate it, but it's in there (page 254)

Hospital Board member Mr. Tolerton:

No one will deny that Dr. Shahawy is qualified to do the procedure (page 256)

Hospital Board member Greenwald:

I just said I wanted to deny this six months (page 257)

Hospital Board member Dr. W. Chapman:

As for the testimony of Dr. Cooper and Dr. Elliott I wasn't too impressed with it (pge 236)

After the Board hearing Dr. Shahway filed this suit against Dr.'s Cooper and Elliott's alleged false testimonies. Furthermore, Dr. Shahawy obtained his records of cardiac catheterization from the University of Florida during the discovery of this suit, which confirmed his position that Dr.s Cooper and Elliott's testimonies were wrong and motivated with malice; and that cardiac catheterizations were performed with expertise and without complications.